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JUDGES OF THE HIGH COURT.

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—THE LORD CHANCELLOR, LORD BUCKMASTER, LORD CARSON, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

P. C.

The Commissioner of Income-tax, Bombay v. The Western India Turf Club, Ltd.

The Commissioner of Income-tax, Bombay ... *Appellant**

v.

The Western India Turf Club, Limited ... *Respondents.*

Indian Income-tax Act (XI of 1922), Ss 26, 55, 58—Indian Finance Act (XIII of 1925), S. 7—Unregistered Association converted into a limited company—Rate of super-tax applicable on profits made prior to conversion.

Where an unregistered Association is converted into a limited company, the rate of super-tax applicable to it, in respect of the profits of the Association for the year previous to that of the conversion, is the flat rate of one anna in the rupee appropriate to a company. So held, on the construction of the Indian Income-tax Act, 1922, Ss. 26, 55 and 58, as read with the Indian Finance Act, 1925, S. 7.

In the Matter of Begg Sutherland & Co., Ltd, (1925) I L R 47 A 715 commented on.

Judgment of the High Court affirmed.

Appeal No. 57 of 1927 from a judgment of the High Court, Bombay (MacLeod, C. J. and Crump, J.), dated the 9th April, 1926, delivered upon a reference made by the Commissioner of Income-tax, Bombay, under the Indian Income-tax Act, 1922, whereby the opinion of the Commissioner upon the questions raised by the case was overruled, and it was decided that the amount of an assessment to super-tax made upon the respondent company was excessive.

The question arising in this appeal, shortly stated, is whether the rate of super-tax applicable to the income dealt with by the assessment was in the circumstances of the case the rate applicable to the income of an unincorporated association of individuals, or the rate applicable to that of an incorporated company.

*P. C. Appeal No. 57 of 1927. 4th November, 1927.

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The respondent company is a company incorporated under the Indian Companies Act (VII of 1913) as a company limited by guarantee. The company was registered on the 1st April, 1925, with the object of taking over, and did in fact take over, the assets, effects and liabilities of the Western India Turf Club.

The Western India Turf Club, before the 1st April 1925, was a members' club and unincorporated, and had been assessed to super-tax upon its total income as an unregistered firm or association of individuals not being a firm at the rates of duty prescribed for such a firm or association by the enactment for the time being in force.

For the year of charge beginning the 1st April, 1925, the rate of duty prescribed for such a firm or association was a scale rate rising from one to six annas in the rupee as provided by the Indian Finance Act (XIII of 1925), *i.e.*, for the excess over the first fifty thousand one anna in the rupee, for the next fifty thousand 1¼ annas, for the next fifty thousand two annas and so on up to six annas.

By the said Act the rate of duty prescribed for an incorporated company for the same year of charge was a flat rate of one anna in the rupee.

The company after its incorporation on the 1st April, 1925, made for the purpose of super-tax for the year 1925-26 a return of the total income of the unincorporated club of the previous year 1924-25. S. 55 of the Indian Income-tax Act, 1922, prescribes that super-tax shall be charged, levied and paid "in respect of the total income of the previous year" of (*inter alia*) any company, unregistered firm or other association of individuals.

The Senior Income-tax Officer assessed the amount of the income of the previous year of the unincorporated club at Rs. 15,03,522, and no dispute arises in the case about the correctness of this figure.

S. 58 of the Indian Income-tax Act, 1922, made applicable to super-tax S. 26 of the same Act. The latter section is set out in the judgment of the Privy Council.

The Senior Income-tax Officer considered that the rate of super-tax applicable to the income in respect of which the assessment was to be made, namely, the income of the unincorporated club for the previous year, was the scale rate prescribed as above stated for the income of an unregistered firm or unincorporated association of individuals, and on this basis he determined, in

pursuance of S. 23 of the said Act, the amount of super-tax to be Rs. 4,59,153.

The respondent company, upon being served with a notice of demand of that amount of super-tax, objected to the amount of the tax so assessed and appealed to the Assistant Commissioner under S. 30 of the said Act on the ground that the rate of tax applicable was not the scale rate which had been adopted, but the flat rate of one anna in the rupee applicable to the income of an incorporated company. Upon the basis of this contention the super-tax payable would have been Rs. 90,845.

The Assistant Commissioner dismissed the appeal and confirmed the assessment under S. 31 of the said Act on the basis determined by the Senior Income-tax Officer.

The respondent company thereupon, pursuant to S. 66 (2) of the said Act, required the Commissioner of Income-tax to refer to the High Court the questions of law arising out of the assessment, and the Commissioner accordingly drew up a statement of the case and submitted it with his own opinion thereon as required by the section to the High Court.

The questions for the opinion of the High Court are set out in the judgment of the learned Chief Justice (*see* I L R 50 Bom. 648 : 28 Bom. L R 1236).

The opinion of the Commissioner upon the questions referred to the Court was as follows :—

"I am clearly of opinion that the profits made by the club in the year 1924-25 when it was not a limited company have been rightly charged to super-tax at the scale rates of one to six annas and that the flat rate of one anna cannot be applied to these profits which are not those of a company having been made prior to the conversion of the club into a limited concern. My answer to the questions is therefore as under:—

(*i*) The profits are liable to super-tax at the scale rates of one to six annas and not at the flat rate of one anna.

(*ii*) S. 26 is to be regarded as merely requiring the company to take the place of the defunct firm for the purpose of the payment of the tax due from it on its profits earned prior to the conversion.

(*iii*) The club is rightly assessed to super-tax at the scale rates of one to six annas.

(*iv*) It cannot be assessed for the year in question at the flat rate prescribed for a company."

The reference made by the Commissioner of Income-tax came on for hearing in the High Court on the 9th April, 1926 before Sir Norman MacLeod, C. J. and Mr. Justice Crump, and judgment was given on the same day overruling the opinion of the Commissioner of Income-tax and deciding in favour of the respondent company the questions submitted in

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the case. The Court held that the rate of super-tax applicable was the flat rate of one anna in the rupee and awarded costs against the Commissioner.

Against this judgment and order the Commissioner of Income-tax preferred an appeal to His Majesty in Council upon leave granted by the High Court under S. 66-A. of the Income-tax Act (inserted by the Amending Act, XXIV of 1926).

The case in the Court below in reported in I. L. R. 50 Bom. 648: 28 Bom. L. R. 1236. The letter from the Commissioner of Income-tax referring the case to the High Court is set out *in extenso* in the report in 28 Bom. L R 1236.

Lowndes, K. C., and *Reginald Hills* for appellant.

A. M. Latter, K. C., and *Raymond W. Needham* for respondents.

Their Lordships' judgment was delivered by

Lord Chancellor.

THE LORD CHANCELLOR.—The question raised by this appeal is a short one. The Western India Turf Club was originally an unregistered Association; but as from the 1st April, 1925, it was converted into a company by being registered under the Indian Companies Act (VII of 1913) as a company limited by guarantee, the object of the company being to take over the assets, effects and liabilities of the Western India Turf Club. The question raised in these proceedings is, at what rate that company should pay super-tax for the tax year commencing on the 1st April, 1925.

The enactment chiefly in point is S. 55 of the Indian Income-tax Act (XI of 1922). That section is in these terms:

"In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, unregistered firm, Hindu undivided family or company, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature."

On that section two questions may arise, which it is necessary to keep distinct.

First, the question may arise on what amount of income the taxpayer is to pay his super-tax. On that point the section provides that he is to pay super-tax in respect of the total income of the previous year. Strictly speaking, this company had no total income in the previous year, for it did not then

exist; but that difficulty is removed by S. 26 of the same Act, which provides that— P. C

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"Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment."

It should be added that S. 26 is applied to super-tax by S. 58. The effect of those sections is that, for the purpose of assessment of super-tax, you must take the total income, not of the respondent company itself, but of the predecessor in title of the company; and the income in this case has been assessed on that basis.

The second question which arises is, at what rate is the taxpayer to pay super-tax. With regard to that point, S. 55 provides that the taxpayer is to pay "at the rate or rates laid down for that year"—that is, for the year of assessment—"by Act of the Indian Legislature." In other words, for the purpose of ascertaining the rate of the tax you are referred to a statute to be afterwards passed. That statute was afterwards passed, and it is Act XIII of 1925. It provides by S. 7, sub-section (2)* that—

"The rates of super-tax for the year beginning on the 1st day of April, 1925, shall, for the purposes of S. 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Third Schedule."

When one turns to Part II of the Third Schedule, one finds these rates specified, namely, "In respect of the excess over 50,000 rupees of the total income (1) in the case of every company, one anna in the rupee." Then follow other rates relating to corporations, individuals or associations not being companies, and some of those rates are calculated on a rising scale. What is the effect of that? It can only be that this particular taxpayer, being a company falling within the first words of Part II of Schedule III, must pay at the rate there specified, namely, at the flat rate of one anna in the rupee.

The argument which has been used in favour of the appeal seems to involve the fallacy that liability to tax attached to the income in the previous year. That is not so. No liability to tax attached to the income of this company until the passing of the Act of 1925, and it was then to be taxed at the rate appropriate to a company.

*Act XIII of 1925 is the Indian Finance Act.—K. J. R.

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Lord Chancellor.

With regard to the Allahabad case which has been cited [*In the Matter of Begg Sutherland and Co., Ltd.* (1)], it is sufficient to say that, if the question there decided should again arise, that decision will require further consideration.

For the reasons which they have given their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty that it be dismissed with costs.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respondents : *E. F. Turner & Sons.*

K. J. R. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Kumar Baijnath Prasad Singh ... *Appellant* (Plaintiff)*

v.

Kedar Nath Goenka and others ... *Respondents (Defendants)*

P. C.

Kumar Baijnath Prasad Singh v. Kedar Nath Goenka.

Impartible estate—Alienability of—Concurrent findings of fact—Non-interference on appeal—Practice of Privy Council.

In the absence of proof of custom restricting alienation, an impartible estate is alienable.

Protap Chandra Deo v. *Jagadish Chandra Deo,* (1927) L R 54 I A 289 53 M L J 30 (P C) followed.

Concurrent findings of the Courts in India on questions of fact (as, for instance, fraud and misrepresentation) will not be disturbed by the Judicial Committee on appeal.

Judgment of the High Court affirmed.

Appeal No. 3 of 1926 from a judgment and decree of the High Court, Patna (Dawson Miller, C. J , and Foster, J.), dated the 6th March, 1925, affirming a decree of the Additional Subordinate Judge of Monghyr, dated the 5th September, 1921.

The suit out of which this appeal arises was instituted by the appellant before the Subordinate Judge of Monghyr to set aside a sale of an impartible estate known as the Khaira Raj which had been in the possession of the appellant's ancestors for several centuries and which was sold by the last male holder Kumar Guru Prasad Singh, the brother of the appellant, by a registered conveyance, dated the 15th of January, 1919, to Rai Bahadur Baijnath Goenka and others who together with the vendor were impleaded as defendants in the suit.

The sale was challenged on two main grounds, (1) that the Khaira Raj, which is an impartible estate governed by the rule

*P. C. Appeal No. 3 of 1926. 15th November, 1927.

1. (1925) I L R 47 A 715.

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of lineal primogeniture, was by custom inalienable, and (2) that Kumar Guru Prasad Singh was of dissolute habits and addicted to drink and drugs by reason whereof his mental capacity was impaired and he was incapable of managing his own affairs and that the purchasers taking advantage of his helpless condition and incapacity induced him by fraud and misrepresentation to execute the conveyance in question.

After recording evidence, both oral and documentary, the learned Subordinate Judge delivered his judgment on the 5th September, 1921. He held that the appellant had not established any custom prohibiting an alienation by the holder of the Raj. He also held that the charges of fraud and misrepresentation had not been proved. In the result the learned Subordinate Judge made a decree dismissing the suit.

Against his decree the appellant appealed to the High Court of Judicature at Patna, and on the 6th of March, 1925, that Court made a decree dismissing the appeal. The learned Judges were of opinion that the holder of the Khaira Raj for the time being was the sole proprietor of it, and therefore had complete powers of alienation, that a custom preventing alienation had not been proved, and that the transaction of sale was valid and binding.

From the said decree of the High Court the appellant preferred an appeal to His Majesty in Council.

De Gruyther, K. C. and *Raikes* for appellant.

Lowndes, K. C. and *Dube* for respondents.

Their Lordships dismissed the appeal on the short ground that the question involved was covered by their recent pronouncement in *Protap Chandra Deo's Case* (1).

Their Lordships' judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—Their Lordships are indebted to counsel for having at the outset explained the difficulties that lie in the way of the appellant in bringing this appeal to a conclusion satisfactory to himself. In their Lordships' opinion the first part of the case is completely covered by the recent decision of their Lordships' Board in the case of *Protap Chandra Deo* v. *Jagadish Chandra Deo* (1), and, as to the second part, it relates to concurrent findings of the Courts in India on questions of fact, and their Lordships are therefore unable to entertain it.

1. (1927) L R 54 I A 289 : 53 M L J 30 (P C).

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Viscount Sumner.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Watkins and Hunter.*

Solicitor for respondents : *H. S. L. Polak.*

K. J. R. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

Sonachalam Pillai and others ... *Appellants**
(*Defendants* 1, 3 *to* 7, 9, 10, 13 *and* 14 *and Supplemental Appellant*)

v.

Kumaravelu Chettiar and others ... *Respondents*
(*Plaintiffs* 1 *to* 6 *and Suplemental Respondent*).

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Sonachalam Pillai *v.* Kumaravelu Chettiar.

Civil Procedure Code (1908), S. 11, *Expl. VI—If controlled by O.* 1, *R.* 8.

Held by the Full Bench.—Explanation VI to S. 11 of Civil Procedure Code is not controlled by O. 1, R. 8 thereof; and a suit filed with leave under O. 1, R. 8 by two or more members of a community who claim a right in common to them and the other members of the community and seek to enforce it on behalf of themselves and the community is *res judicata* by reason of a decision given after *bona fide* contest in a prior suit filed without leave under S. 30 of Civil Procedure Code of 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin, dated 17th March, 1923, in O. S. No. 2 of 1920.

The Advocate-General and *K. S. Sankara Aiyar* for 2nd appellant.

T. Nallasivam Pillai for appellants 2 to 6 and 8 to 10.

T. R. Ramachandra Aiyar, T. L. Venkatarama Aiyar and *V. Sambandam Chettiar* for respondents 1 to 6.

The Court (Kumaraswami Sastri, J., and Devadoss, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The plaintiffs are Vaniyars or oil-mongers of Tiruchendur. They sue for a declaration that they are entitled to worship in the Subrahmaniaswami temple at Tiruchendur by going

*Appeal No. 232 of 1923. 16th September, 1927.

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into the inner Mayil Maha Mantapam, to go round all the prakarams in the temple, to place their Kavadies on the koradu in front of the Valliamman shrine, etc., and for an injunction restraining the defendants from interfering with the right of worship.

The defendants, who are the Dharmakarthas, Stanikars of the temple and the three Vellala inhabitants of Tiruchendur, deny the plaintiffs' right to go into the Mayil Maha Mantapam for the purpose of worship and their right to place Kavadies on the koradu in front of the Valliamman shrine and contend that they and their caste-men are prohibited from going beyond the Irawatha Mantapam or going round any of the prakarams. The Subordinate Judge of Tuticorin has granted the plaintiffs the declaration and injunction prayed for. The defendants prefer this appeal.

The first point urged by the learned Advocate-General for the appellants is that the present suit is barred by reason of the decree in O. S. No. 14 of 1877 on the file of the Subordinate Judge's Court of Tuticorin which was confirmed on appeal to the High Court in A. S. No. 73 of 1878. Before considering the appeal on the merits it is necessary to record a finding on the question of *res judicata*, for, if the suit is barred by reason of the decision in the previous suit, it would not be necessary to try the appeal on the merits. The present suit is by the Vaniyars of Tiruchendur. They have obtained permission under O. 1, R. 8 of the Civil Procedure Code to sue on behalf of all the Vaniya Vysia residents of Tiruchendur. The plaintiffs in O. S. No. 14 of 1877 were four Vaniyars, two of whom father and son were residents of Venkatramapuram, and the other two were residents of Thattamadam Village, Thenkarai Taluk, Tinnevelly District. The plaint as translated in the printed record before us is admittedly incorrect and it has been corrected. In prayer 1 the words "and other Vaniyars" should be added between the words "plaintiffs" and "to worship" and at the end of the paragraph the words "and to establish the right of the plaintiffs and others belonging to the Vaniyar caste." Their allegation in the plaint was that they and all the other Vaniyars had from time immemorial been in the habit of worshipping the deity going as far as the wooden Ali (lattice) placed between Ardhamantapam and Mahamantapam in the temple of Sri Subrahmania Swami at Tiruchendur and also tying and taking Kavadies and placing them before the Valliamman temple comprised within the compound of Sri Subrahmania Swami

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temple, and that on the 8th February, 1876, the 1st plaintiff was taking Kavadi and bowing in worship within the temple of the said Sri Subrahmania Swami along with the plaintiffs 2 to 4, that the defendants 1 to 7 had pushed the plaintiffs out of the said temple unjustly and forcibly and they prayed that

"the Court may be pleased to pass a decree establishing the right due to the plaintiffs to worship the deity going as far as the wooden lattice placed between Ardhamantapam and Mahamantapam in the temple of Sri Subrahmania Swami and to tie and take Kavadies and place them before the Valliamman temple comprised within the compound of the said temple of God Subrahmania and to establish the right of the Vaniyars and for a permanent injunction restraining the defendants from causing obstruction to them and other Vaniyars and for damages for Rs. 5,000 for loss of dignity and mental pain caused to the plaintiffs."

The defendants were the Maniyam, Archakar, other servants and the Dharmakarthas of the temple. They in their written statement denied the right of the plaintiffs and other Vaniyars to go into the Mahamantapam and averred that from immemorial usage the limit prescribed for their worship was the spot marked "C" in the plan, and that as they had exceeded that limit they were properly sent out of the temple. The Subordinate Judge of Tuticorin after a careful consideration of the evidence dismissed the plaintiffs' suit. They appealed to the High Court in A. S. No. 73 of 1878. Mr. Justice Innes and Mr. Justice Muttuswami Aiyar dismissed the appeal with the remark that

"the reasons assigned by the Judge who passed the decree dismissing the plaintiffs' suit are satisfactory to show that plaintiffs have not made out the right they claim."

It is urged by the learned Advocate-General that O. S. No. 14 of 1877 was filed by the plaintiffs to assert the right of all Vaniyars and as it was litigated *bona fide*, Explanation 6 to S. 11 of the Civil Procedure Code applies to the case and the present suit which is brought for the same relief as that claimed in that suit is barred by *res judicata*. The contention of Mr. Ramachandra Aiyar is that there is nothing to show that O. S. No. 14 of 1877 was brought to assert the right of the whole community of Vaniyars, that the provisions of S. 30 were not complied with and that it was a suit for a personal remedy by way of damages and therefore the decision in that case cannot bar the present suit. It is urged by the learned Advocate-General that permission need not be express and he relies on *Krishna Kumara Deb* v. *Atul Chandra Ghose* (1). He also urges relying on *Dhunput Singh* v. *Paresh Nath Singh* (2)

1. (1924) 39 C L J 612. 2. (1893) I L R 21 C 180.

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that the Court ought to presume that the rules and forms of pleading were complied with by the Court. No doubt in the case of mandatory provisions of the processual law, in the absence of any evidence to the contrary, the Court would presume that all rules and legal forms were complied with as the tribunal is presumed not to deviate from the rules and forms laid down for its guidance. But where, as in this case, the provisions of S. 30 of the Code of 1877 are only enabling and not mandatory, such a presumption does not arise. We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly under S. 30 corresponding to O. 1, R. 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyars interested along with the plaintiffs to worship in the Tiruchendur temple as alleged by the plaintiffs for the following reasons:—

(1) There was no provision in the Code of 1859 corresponding to S. 30 of the later Codes.

(2) The provisions of S. 30 were for the first time enacted in the Code of 1877 which came into force on the 1st October 1877; and

(3) It was very unlikely that the pleaders of Tuticorin would have become familiar with the provisions of the new Code before the 8th November 1877, the date on which the plaint was filed.

(4) Neither in the plaint nor in the written statement which is found in the printed records of A. S. No. 73 of 1878 nor in the judgment is there any reference to the new provision contained in S. 30 of the Code.

The next question is whether O. S. No. 14 of 1877 was brought in order to establish the right of the whole community and not merely the personal right of the plaintiffs on record. The only materials upon which any conclusion can be arrived at are the plaint, the judgment and the decree. In paragraph 1 of the plaint it is stated that the plaintiffs belong to the third caste, Vaisyas. In paragraph 2 the averment is

"the plaintiffs and all the other Vaniyars have from time immemorial been in the habit of worshipping the deity," etc.

In paragraph 3 they (meaning the defendants)

"have also from that date to this day been obstructing the entire community of Vaniyars including the plaintiffs from crossing the outside compound and entering in."

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In paragraph 4 it is alleged

"on account of the aforesaid act and obstruction the plaintiffs and other Vaniyars have been lowered in the estimation of the people of other castes of an equal status."

In prayer 1 the relief is asked for establishing the right due to the plaintiffs to worship the deity, etc., and to establish the right of the Vaniyars; and in prayer 2 injunction is asked for against the obstruction caused to the plaintiffs and other Vaniyars.

Issue 1 is in the following terms:—

(1) Whether oil-mongers commonly known as "Vaniyar" are admitted into the plaint temple to worship at the spots A and B?

An attempt was made by the plaintiffs to raise the larger issue whether the plaintiffs were Vaisyas as they hoped by proving that they were Vaisyas they would be entitled to go to the Mahamantapam of the temple for worship. The Subordinate Judge thought it was unnecessary to consider the issue "whether the plaintiffs come under the class of Vaisyar," as he thought that the claim was "based entirely upon immemorial usage" and "the question of caste was not one capable of easy decision among Hindus." The decree simply says that the suit is dismissed. From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the parties appearing in the judgment, we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated *bona fide* cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the case to the hilt. After they were defeated in the Subordinate Judge's Court, the plaintiffs preferred an appeal to the High Court where also they sustained a defeat. There is no suggestion, much less proof, that O. S. No. 14 of 1877 was not conducted *bona fide* by the plaintiffs. The question is whether the decision in that suit bars the present suit. There are a number of decisions on the point and they are not quite reconcilable. We shall deal with cases which

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support the appellants' contention. In *Rangamma* v. *Narasimhacharyulu* (3) it was held that

"Explanation 6 to S. 11 of the Code of Civil Procedure is not confined to cases in which the prior suit was brought with the permission of the Court under O. 1, R. 8 thereof. The Explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned."

In that suit some Agraharamdars brought a suit to eject the defendants from their possession. In a former suit for the same relief, one of the plaintiffs in the later suit was not a party to the earlier suit. It was contended that inasmuch as the plaintiff was not a party to the previous suit, he was not bound by the decision in that suit. Sadasiva Aiyar and Moore, JJ., held that the plaintiffs' suit was barred by the decision in the previous suit. Sadasiva Aiyar, J., after an examination of several cases on the point came to the conclusion that Explanation 6 to S. 11 made no reference to O. 1, R. 8 and, therefore, O. 1, R. 8 cannot control Explanation 6. He observed at page 31:

"The addition of an individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the Agraharamdars (it is also the right claimed in the present suit) from being *res judicata* in the present suit."

Moore, J., observed at page 32:

"The joint right which the plaintiff claimed is identical with the relief sought for in the present suit, and he was clearly litigating *bona fide* in the interests of all the Agraharamdars. I am unable to agree with the Subordinate Judge that Explanation 6 to S. 11 of the Civil Procedure Code must be treated as confined to cases in which permission to sue in a representative character is obtained under O. 1, R. 8 of the Civil Procedure Code."

In *Gopalacharyulu* v. *Subbamma* (4) it was held

"Explanation 5 to S. 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under O. 1, R. 8, but also to cases where some of the persons claiming a private right in common with others litigate *bona fide* on behalf of themselves and such others."

Sir John Wallis, C. J., who felt considerably pressed by the argument that Explanation 5 was enacted at the same time as S. 30 in the Code of 1877 and therefore the explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given under section 30, observes at page 492 :

3. (1916) 31 M L J 26. 4. (1919) I L R 43 M 487 : 38 M L J 493.

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"The Explanation no doubt applies to such cases, but it is not in terms confined to them. It may be, that if a suit to which S. 30 is applicable were brought without the consent of the Court, the plaintiff could not be considered to be litigating *bona fide* on behalf of the other persons interested, that is, not only honestly but with due care and attention, or in other cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should not in my opinion be justified in refusing to apply it to such cases"

He considered almost all the cases on the point and referred to the decision of Sir John Edge, C. J., in *Ram Narain* v. *Bisshishar Prasad* (5) as to the care that should be taken in applying the explanation only to cases which come within its very wording. These two cases were followed by Sir William Ayling and Odgers, JJ., in *Chenraya Goundan* v. *Athappa Goundan* (6), wherein they held the fact that the former suit was not instituted with the leave of the Court under O. 1, Rule 8, Civil Procedure Code, did not exclude the application of Explanation 6 to section 11. In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) it was held by Kernan and Forbes, JJ., that Explanation 5 of S. 11, Civil Procedure Code, is not limited to the case of a suit under S. 30. In that case a decree was obtained against a karnavan of a Malabar Tarwad. The suit was brought to set aside the decree. The question for decision was whether the plaintiff, a member of the Malabar Tarwad, was bound by the decree against the karnavan of the Tarwad declaring that a certain land was not the jenm of the Tarwad but was held by the karnam on kanom. The karnavan was the defendant in the previous suit. After referring to the position of the karnavan of the Malabar Tarwad and its usages, the learned Judges observed at page 332:

"Explanation 5 is not limited in its language to a suit under S. 30 which authorises a suit or defence by one or more parties on behalf of numerous other parties having the same interest in a suit. In such suits the parties suing or defending must have permission of the Court to sue or defend, and must, in the plaint or defence, purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those interested who are not parties to the suit."

This observation of the learned Judges was relied upon by Sadasiva Aiyar, J., in *Rangamma* v. *Narasimhacharyulu* (3). In *Madhavan* v. *Keshavan* (8), Kernan and Parker, JJ., observe :

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3. (1916) 31 M L J 26.
5. (1888) I L R 10 A 411.
6. (1923) 18 L W 177.
7. (1880) I L R 2 M 328.
8. (1887) I L R 11 M 191.

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"There are no grounds for supposing that the litigation of the Uralars with 5th defendant was not *bona fide* and therefore we think that the matter is *res judicata* under S. 13, cl. (5) of the Civil Procedure Code."

In that case the Uraima right over a certain Devaswam was vested in certain Illams, one Urala representing each Illam. All the Illams except that of plaintiff were represented in the litigation with defendant 5 in 1881. The plaintiff in the later suit was not a party to the previous one. The learned Judges held that the plaintiff was bound by the decision in the previous suit inasmuch as the previous suit was in the nature of the assertion of the common right of all the Uralars. We may remark here that Explanation 6 of the present Code was Explanation 5, and Order 1, Rule 8, was S. 30, of the previous Code. In *Chandu* v. *Kunhamed* (9) the mortgagee of the share of defendant 1 in a paramba brought a suit for possession of that share. An issue was raised in the previous suit whether the paramba was partible or not and was decided against the present defendant No. 2 who was defendant 6 in the previous suit. Sir Arthur Collins, C. J., and Handley, J., held that the

"present defendant 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by Explanation 5 of S. 13 of the Code of Civil Procedure"

and therefore the decision in the previous suit adverse to the 2nd defendant's title was *res judicata* and conclusive against him in the present suit.

It is argued by Mr. Ramachandra Aiyar that these cases do not touch the point as *Rangamma* v. *Narasimhacharyulu* (3) was a case of agraharamdars and the case in *Gopalacharyulu* v. *Subbamma* (4) was also a case of agraharamdars and to such cases the provisions of S. 30 could not be applied and therefore they are not authorities for the contention as to *res judicata.* His argument is that S. 30 is applicable only to cases where there are numerous parties who cannot all be conveniently brought before the Court, but where parties are not too numerous they should all be made parties to the action as no one is authorised to file a suit or defend one on behalf of another, and therefore the provisions of Explanation 6 must be confined to cases covered by O. 1, R. 8, and also to cases where persons are by law entitled to represent a class or

3 (1916) 31 M L J 26. 4. (1919) I L R 43 M 487: 38 M L J 493.
9. (1891) I L R 14 M 324 : 1 M L J 529.

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authorised by persons to represent them before the Court. Explanation 6 of S. 11 of the present Code is:

"Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

This Explanation is a reproduction of Explanation 5 of the Codes of 1877 and 1882 with the addition of the words "of a public right". These words were added on account of the enactment of the new S. 91 of the present Code. Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, *i. e.,* where persons bring a suit or defend a right common to themselves and others and the litigation is not merely for the benefit of the persons on record but for all the persons who are interested in that common right, all other persons interested in such right shall be deemed to claim under the persons so litigating. If S. 30 is to govern this explanation, the legislature would not have used the words "deemed to claim under the persons so litigating," for when permission is granted under S. 30 to a few persons to sue or defend on behalf of the whole class, every member of that class is a party to the proceeding. The use of the words "deemed to claim," we think, gives a clue to the meaning of the section where persons sue for themselves as well as on behalf of others; though they may not get the permission of R. 8, yet their litigation is for the benefit of the whole class and when that litigation is conducted *bona fide,* there is no reason why the decision in that suit should not bind all the persons for whose benefit it was conducted. It has been held in a number of cases that R. 8 is only an enabling provision. It is open to the defendants in a case to bring to the notice of the Court that leave ought to be obtained as was done in *Vasudevan* v. *Sankaran* (10). But where the defendants do not object to the suit proceeding without the permission under R. 8, the persons for whose benefit the litigation is conducted cannot in case of failure to succeed turn round and say that they are not bound by it, for, if the common right had been established, they would be the first to claim the benefit of that decision.

We shall now deal with the cases relied on by Mr. Ramachandra Aiyar in support of his contention. In *Kombi* v. *Lakshmi* (11) it was held that if it was sought to make a

10. (1897) I L R 20 M 129 : 7 M L J 102 (F. B.).
11. (1882) I L R 5 M 201.

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decree in a suit binding on a Malabar Tarwad, the procedure laid down in S. 30 of the Code of Civil Procedure, 1877, should be followed if the members are numerous. Innes and Muttuswami Aiyar, JJ., observe at page 206 :

"If a tarwad does not strictly fall within the denomination of a corporation, S. 30, in cases in which the members of the tarwad were numerous, would at all events apply, which, while authorising one of the persons interested to defend by leave of the Court on behalf of all, requires notice of the institution of the suit to be given to all; and a decree in such case, it is presumed, would be a decree against the entire body defending by such person."

The question there was whether a decree which was obtained against the Karnavan was binding upon the whole Tarwad. In *Vasudeva* v. *Narayana* (12) the same question arose whether a decree obtained against the Karnavan of a Nayar Tarwad or of a Nambudri Illam is binding on the family. Innes, J., held differing from *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) that

"Every member of the tarwad is interested in the joint property and ought to be made a party or have notice under S. 30, so that he may have the option of coming in as a party in any suit, the object of which is to affect the property."

Kernan, J., who agreed with Innes, J., does not observe that *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) was wrongly decided but explains the decision on the facts. He observes at page 129:

"I fully assent to the proposition that all persons whose interests are sought to be prejudicially affected by a suit, should be parties to it. But there are exceptions to that rule when such interests are considered to be sufficiently represented and protected by parties to the suit."

In *Gopalan* v. *Valia Tamburatti* (13) Sir Charles Turner, C. J., and Kernan, J., observe that

"A practice has prevailed in Malabar whereby the Karnavan has been recognised as representing the tarwad and entitled to sue or defend suits as such representative without the association of the other members of the tarwad, who were nevertheless held bound by decrees passed in such suits, unless they showed *mala fides* in their representative. This practice had its origin in convenience but now that the Code of Civil Procedure, S. 30, contains a special provision to obviate the inconvenience, where a number of persons in the same interest have occasion to assert or defend their rights by suit, it may be doubted how far the practice would be now upheld and it is advisable that resort should be had to the provisions of S. 30, Civil Procedure Code."

7. (1880) I L R 2 M 328. 12. (1882) I L R 6 M 121.
13. (1883) I L R 7 M 87.

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In *Ittichan* v. *Velappan* (14) it was held that

"although the property of a Tarwad may be attached and sold in execution of a decree when the Karnavan is sued as representative of the Tarwad, members of the Tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure, are not estopped from showing that the debt for which the decree was passed was not binding on the Tarwad."

The principle of this decision is explained by Muttuswami Aiyar, J., in *Sri Devi* v. *Kelu Eradi* (15). In another case, *Thanakoti* v. *Muniappa* (16), in the same volume, the decision in a suit, in which some ryots of the village claimed the right to use water during the day-time which right was common to themselves and other villagers, was held not to bar a subsequent suit for the same relief in assertion of the same right by persons who are not parties to the previous suit. Hutchins, J., held on the facts that in the previous suit, the claim was not on behalf of the others, but it was for damages caused to himself individually, and the suit was not a representative suit under S. 30, nor was it under the law as it existed before the amendment of the Code. Kernan, J., observes at page 499:

"One party having a right in common with others is not at liberty or authorised to sue in his own name to establish the right of the others except by their authority. Explanation 5 must be read with the provisions of S. 30 and the principles to be found in that section."

In *Sri Devi* v. *Kelu Eradi* (15) it was held that the junior members of the Pathirakat Arikkare Tarwad were entitled to recover property of which the Tarwad was dispossessed in execution of a decree against the Karnavan and senior Anandravan on proof that the decree was not substantially correct. The learned Judges explain at page 83 the grounds of the decision of the Full Bench in *Ittichan* v. *Velappan* (14). They observe:

"It was held by the Full Bench that the intention to implead the Karnavan as representative of the Tarwad must appear from the proceedings in the first suit, and that the debt recognised by the decree must be binding on the entire Tarwad."

They observe at page 82:

"The decision in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) is a clear authority for the position that Explanation 5 of S. 13 of the Code of Civil Procedure is not limited to the case of a suit in which the provisions of S. 30 were complied with, and we should follow it if subsequent decisions did not throw doubt upon it."

7. (1880) I L R 2 M 328. 14. (1885) I L R 8 M 484 (F B).
15. (1887) I L R 10 M 79. 16. (1885) I L R 8 M 496.

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The question whether a Karnavan could represent the Tarwad in a properly framed suit is only one of historic interest as it has been definitely settled by the Full Bench in *Vasudevan* v. *Sankaran* (10). It was held in that case

"a decree in a suit in which the Karnavan of a Nambudri Illam or a Marumakkatayam Tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties."

Mr. Ramachandra Aiyar relies upon some of the observations of the learned Judges in the case, but the question turned upon the principle of substantive law whether a Karnavan could represent the Tarwad so as to bind it. The Karnavan of a Nambudri Illam or a Marumakkatayam Tarwad could bind the Illam or Tarwad when he acts in a representative capacity. Shephard, J., observes at page 139:

"The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the Code of 1877 came into force [*Srikhanti Narayanappa* v. *Indupuram Ramalingam* (17)]."

Subrahmanya Aiyar, J., observes at page 142, after referring to the case of Hindu widows with reference to reversioners and other persons having an estate analogous to that of a Hindu widow,

"In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a Karnavan. Consequently, he does not require the aid of S. 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family."

In *Srinivasa Chariar* v. *Raghava Chariar* (18) Shephard, J., held that S. 30 was only an enabling provision and a suit was not liable to be dismissed by reason of the failure of the plaintiffs to obtain permission given under S. 30 of the old Code. The omission could be rectified at any stage if objection is taken by the defendants. The above are the cases of the Madras High Court which take a different view from the view in *Rangamma* v. *Narasimhacharyulu* (3), *Gopalacharyulu* v. *Subbamma* (4), *Chenraya Goundan* v. *Athappa Goundan* (6), *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) and *Madhavan* v. *Keshavan* (8).

3. (1916) 31 M L J 26. 4. (1919) I L R 43 M 487 : 38 M L J 493.
6. (1923) 18 L W 177. 7. (1880) I L R 2 M 328.
8. (1887) I L R 11 M 191. 10. (1897) I L R 20 M 129: 7 M L J 102 (F B)
17. (1866) 3 M H C R 226.
18. (1899) I L R 23 M 28 : 7 M L J 281.

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In *Muhammad Amir* v. *Sumitra Kuar* (19) it was held by Sir Henry Richards, C. J., and Sir Pramadha Charan Banerji, J., that where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property, and it had been decided that the property in question was not waqf, the decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration. The learned Judges held that the previous litigation was a *bona fide* one and that the plaintiffs were litigating as members of the public and not in the private capacity. In *Baiju Lal Parbatia* v. *Bhulak Lal Pathuk* (20) it was held that S. 30 of the Code was an enabling provision and did not debar the plaintiffs from suing in their own right in that case. Ameer Ali, J., at page 389, observes:

"That section (meaning S. 30) is, as has been already pointed out, an enabling section and must be read, it seems to me, in conjunction with Explanation 5 to S. 13 of the Civil Procedure Code."

In *Shankarlal* v. *Dakar Temple Committee* (21) it was held that O. 1, R. 8, Civil Procedure Code, is merely an enabling rule and does not prevent a representative suit being brought in any manner that the law permits.

The principle of S. 30 was given effect to before it was enacted. A representative suit could be brought by a few persons in order to obtain a relief common to them as well as a number of other persons. In *Srikhanti Narayanappa* v. *Indupuram Ramalingam* (17) it was observed:

"Convenience requires that in suits where there is community of interest amongst a large number of persons, a few should be allowed to represent the whole; and if the whole body be represented in the suit, then it is proper that the whole body should be bound by the decree, though some members of the body are not parties named in the record."

The learned Judges Bittleston, Ag. C. J., and Ellis, J., after considering the English practice held that the principle of representation should be applied to the members of a Hindu village community. In *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (22) West, J., observes:

"The case of *Jenkins* v. *Robertson* (23) is instructive in this respect and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing

17. (1866) 3 M H C R 226. 19. (1914) I L R 36 A 424.
20. (1897) I L R 24 C 385. 21. (1925) 28 Bom. L R 309.
22. (1883) I L R 7 B 323 at 328.
23. (1867) L R 1 App. Cas. (Sc.) 117.

a large class may, if fairly and honestly conducted, bind or benefit the whole class."

Before S. 30 was enacted, the practice was in vogue, both in Bombay as well as in Madras, for persons to bring a representative suit to obtain relief in respect of a right common to themselves as well as others and the decision in such a suit was held to bind the persons whom they represented provided the right claimed was litigated *bona fide*. The terms of the Explanation 6 of the present Code which are the same as the terms of the Explanation 5 of the old Code except for the addition of the words "public right" are so wide as to include cases where the right common to the plaintiffs on record as well as others is litigated *bona fide* in the interest of the whole class, and there is no warrant in any other provisions of the Code to limit it only to cases coming under S. 30 or to cases where persons, either by law or by act of parties, are entitled to represent the others whose names do not appear as parties on the record. It is urged that there is danger in giving a literal interpretation to Explanation 6, for, if a few persons are allowed to sue on behalf of a large community, the community would be bound by the decision in the suit litigated *bona fide,* though the case might not have been placed in all its aspects owing to the ignorance of the plaintiffs or their inability to secure evidence which would really help them. On the other hand, a right which is common to the members of a numerous community should not be litigated for every infraction by a few persons coming forward each time as plaintiffs and thereby harassing the defendants who are obliged to defend several actions in protecting their rights. It is unnecessary to pursue this speculation any further. As there is a serious conflict of authority on the point, we think a reference ought to be made to the Full Bench of the High Court for a clear decision on the point. We would therefore refer the following question to the Full Bench:—

"Is Explanation 6 to S. 11 controlled by O. 1, R. 8 of the Civil Procedure Code, so as to render a subsequent suit filed with leave under O. 1, R. 8, by two or more members of the community who claim a right in common to them and the other members of the community and seek to enforce it on behalf of themselves and the community *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under S. 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community ?"

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The Advocate-General and *K. S. Sankara Aiyar* for 2nd appellant.

T. Nallasivam Pillai for appellants 2 to 6 and 8 to 10.

T. R. Ramachandra Aiyar, T. L. Venkatarama Aiyar and *V. Sambandam Chetti* for respondents 1 to 6.

The Court expressed the following

Rameśam, J.

OPINION :—*Ramesam, J.*— The facts of the case are fully stated in the referring judgment and need not be repeated here. The question referred to the Full Bench is stated as follows :—

"Is Explanation 6 to S. 11 controlled by O. 1, R. 8 of the Civil Procedure Code, so as to render a subsequent suit filed with leave under O. 1, R. 8, by two or more members of the community who claim a right in common to them and the other members of the community and seek to enforce it on behalf of themselves and the community *res judicata* by reason of a decision given after *bona fide* contest in a previous suit filed without leave under S. 30, Civil Procedure Code, 1877, by some other members of the community claiming the same right and seeking to enforce it on behalf of the community?"

As was pointed out at the time of the argument by my Lord the Chief Justice, the word "render" in the second line seems to be a slip for "prevent"; the sentence will then run "so as to prevent a subsequent suit . . . . on behalf of themselves and the community being *res judicata* . . . . ."

The idea is, if O. 1, R. 8 does not control Explanation 6 to S. 11 and the Explanation has its full effect unhampered by any other consideration, then there is *res judicata;* if Order 1, Rule 8, controls Explanation 6, that is, effect is not to be given to Explanation 6 on the ground that the procedure in Order 1, Rule 8, is not followed, then there is *res judicata*. The question referred to us is, which of these two alternatives is to be adopted ?

It is true that Explanation 5 to S. 13 in the Code of 1877 corresponding to Explanation 6 to S. 11 of the present Code was introduced for the first time along with other explanations in the Code of 1877 and S. 30 of that Code corresponding to Order 1, Rule 8, of the present Code was also introduced for the first time in that Code following the enactment of O. XVI, Rule 9, in 1873 in the Supreme Court Rules of Practice in England. Prior to the Code of 1877, that is, in the Act of 1859, there is nothing corresponding to S. 30 of the Codes of 1877 and 1882 and the section relating to *res judicata* was a very

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general section without the explanations which appear in the Codes of 1877, 1882 and 1908. But this does not mean that the principles of the law of *res judicata* were changed or underwent an alteration in 1877. In theory the law was always the same and the same principles were always applied ; only the expression of that law in the form of a section in the Code as required by Indian conditions underwent alterations as time went on. A representative suit by some persons only on behalf of a large class similarly interested was allowed both in England and India prior to 1877 and if such a suit was *bona fide* litigated, the judgment in it was held to bind persons not actually parties to the litigation. In the *Duke of Bedford* v. *Ellis* (24), Lord Macnaghton observes as follows :—

"There is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court of Chancery to all divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice, the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience : for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Again at page 10, he observed:

"I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord Eldon. It is, of course, not necessary nowadays to go to a Court of Law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was *a hundred years ago*."

From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair* v. *New River Co.* (25) and in *Cockburn* v. *Thompson* (26) without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire.

Earlier at page 9 Lord Macnaghton mentions the case of *Chaytor* v. *Trinity College* (27) as one of the earliest applications of the rule. The case in *Commissioners of Sewers of*

24. (1901) App. Cas. 1. 25. (1805) 11 Ves. 429 : 32 E R 1153.
26. (1809) 16 Ves. 321 : 33 E R 1005.
27. (1796) 3 Anstr. 841.

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the City of London v. *Gellatly* (28) is a good example (*vide* Daniel's Chancery Practice, Vol. I, page 175). When, in the year 1866, it was held by the Madras High Court that the decree in a former suit defining the boundary between two villages was binding on the inhabitants of one of the villages in a later suit though they were not parties to the former suit on the ground that the former suit was a representative one [*Srikhanti Narayanappa* v. *Indupuram Ramalingam* (17)] they were merely following the well-established English practice. The learned Judges observe :

"This principle of representation is acted upon in English Courts of Common Law."

They refer to *Queen* v. *The Inhabitants of Haughton* (29) and proceed :

"The same principle is recognised by the English Courts of Equity, when they allow suits to be maintained by a few expressly for themselves and others with whom they have a community of interest, as by some inhabitants of a parish for themselves and the rest."

Similarly in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (22) West, J., observed at page 328 :

"The case of *Jenkins* v. *Robertson* (23) is instructive in this respect, and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted, bind or benefit the whole class."

In the last mentioned case which was from Scotland, though it was held that there was no *res judicata* on the ground that the former litigation terminated in a compromise, all the Scotch Lords were agreed that but for that fact the former decision would have barred the second suit as *res judicata*. It appears therefore that even prior to 1877 (1873 in England) if there was a properly constituted representative suit and the trial in it proceeded on the footing of representation, the judgment in it may bind in a later litigation persons who were not actually parties to it. The cases falling under Explanation 6 after 1877 may be grouped under the following heads:—

1. Where permission has been expressly granted by the Court under S. 30. This is a plain case and it is conceded by both parties that the decision in the earlier suit will bar the later suit as *res judicata*.

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17. (1866) 3 M H C R 226. 22. (1883) I L R 7 B 323 at 328.
23. (1867) L R 1 App. Cas. (Sc.) 117.
28. (1876) 3 Ch. D 610.
29. (1853) 1 El. & Bl. 501 : 118 E R 523.

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2. Though no permission was sought or was given under S. 30, still some of the parties sue or are being sued in a representative capacity. Where a plaintiff sues in a representative capacity he has authority to so represent other persons not parties to the suit under the general law. Where a defendant is being sued in a representative capacity he has similarly authority under the general law to represent other persons not parties and he is himself willing to conduct the litigation on behalf of such others.

Examples of the second heading easily occur in Hindu Law and Malabar Law. Where the manager of a Hindu joint family sues or is being sued on behalf of the family, where the Karnavan of a tarwad sues, or is being sued on behalf of the tarwad, or where a Hindu father sues or is being sued as manager of a sub-branch consisting of himself and his sons, the manager, Karnavan or the father, as the case may be, acting in a representative capacity will bind others whom they represent. As to the case of a Malabar tarwad there is a very large number of decisions of this Court which are quoted in the referring judgment. I do not think it is necessary to refer to them in detail. They begin with *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (7) and end with the decision of the Full Bench in *Vasudevan* v. *Sankaran* (10), in which the matter was finally set at rest. It is unnecessary to discuss these cases because Mr. Ramachandra Aiyar, the learned vakil for the respondents, conceded the correctness of the last Full Bench decision. He concedes that S. 30 is not confined to cases where leave is expressly sought for and obtained but will cover cases where under the law a person like the Karnavan of a tarwad has authority to represent other persons not parties to the suit.

3. Where the trustees of a temple sue or are being sued, for example, the case *Madhavan* v. *Keshavan* (8), where the litigation by certain Uralars of a Devaswom was held to bind the other Uralars. But Mr. Ramachandra Aiyar distinguishes this case on the ground that in such cases the idol of the temple is the real party in both suits and there is no question of one party representing another. Though he is able to distinguish the case in *Madhavan* v. *Keshavan* (8) in this way because it happened to be a case of trustees of a Hindu temple, I doubt whether the said ground of distinction will be available

7. (1880) I L R 2 M 328. 8. (1887) I L R 11 M 191.
10. (1897) I L R 20 M 129 : 7 M L J 102 (F B).

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in cases of private trust. In a case where there are a number of trustees (not of a religious institution but) acting on behalf of some *cestui que trust* under some trust deed and only some of the trustees are sued, I fancy the decision would be the same as in *Madhavan* v. *Keshavan* (8). Both the *cestuis que trustent* and the other trustees would be bound by a litigation conducted *bona fide* by some only of the trustees and the distinction suggested by Mr. Ramachandra Aiyar will not be applicable in such a case. So far as the *cestuis que trustent* are concerned it may be said that they claim through the trustees but as to the co-trustees, Explanation 6 must be invoked. But apart from the above three categories there may still be a large number of cases which cannot be labelled under a particular heading and in which there may be several persons with similar interest and some only may sue but purporting to sue on behalf of all the others. If in such a case permission of the Court under S. 30 was not sought for by oversight and the Court itself overlooks the necessity for the procedure under S. 30, what is the result of final decree in the case? This is really the point to be decided before us. Mr. Ramachandra Aiyar contends in such a case that the failure to obtain leave under S. 30 is fatal and that the suit cannot be regarded as a representative suit. His contention amounts to this: A suit is representative or not according as leave is given under S. 30 or not in all cases where there is no authority under the general law. I agree with Mr. Ramachandra Aiyar's contention to this extent, namely that, where a person acting in a representative capacity has no authority under the general law, if his litigation is to be a representative one so as to bind others, he must at least get authority from the Court; but this does not necessarily mean that such authority from the Court should be necessarily in the form of an order on a petition filed under S. 30 of the Code of Civil Procedure. If a suit filed by a plaintiff in a representative capacity *was allowed* to proceed in that character without objection by the defendant and by the Court and if a general issue is framed so as to put in issue the right of the whole class in whom it is alleged to exist and the evidence adduced is of a general character and the findings, the judgment and the decree are also perfectly general in their nature, I do not see why such a judgment should not bind persons not parties to the

8. (1887) I L R 11 M 191.

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suit in spite of the fact that no application was filed under S. 30 and no order passed on it. The object of S. 30 in the Codes of 1877 and 1882 and of O. XVI, R. 9 in the Supreme Court Rules was merely to make more definite some kind of procedure which was previously going on for more than 100 years in England and India. The prior procedure was apparently not regulated by any enactment and was more a matter of practice left to the discretion of the individual Judges. Later on, it took a more definite shape the object being to impose some safeguards and to avoid possible hardships in the working out of the rule of *res judicata* by reason of representative suits. It was supposed that a special notice to the persons having any right where they are not numerous, or a general notice where they are very numerous, and the provision permitting any of them to be made parties would avoid any possible hardship or injustice arising out of the rule of *res judicata* by reason of Explanation 6. But if the exact procedure prescribed in the section is not followed though the suit proceeds in a representative capacity, it does not follow that the character of the suit is altered. All that can be said at the most is that there is an irregularity. It is possible sometimes that the irregularity may be serious; and if there is any reason to think that the serious irregularity has led to collusion or fraud or a grossly negligent conduct of the case, then the Court will hold that the litigation was not carried on *bona fide* and will not hold a later suit barred by *res judicata.* But when there is no ground to suspect that the irregularity was serious or led to collusion or fraud, or by reason of want of publicity the case was conducted in an improper manner, the irregularity is by itself no ground for holding that Explanation 6 is not applicable. The irregularity may be an element in considering the question whether the former litigation was conducted *bona fide.* [See e. g., *Kumarandy Kudumban* v. *Venkatasubramania Aiyar* (30)]. But in spite of the irregularity, if one comes to the conclusion that the conduct of the litigation was *bona fide*, the irregularity itself does not matter: in other words, I am of opinion that Explanation 6 to S. 11 is not controlled by Order 1, Rule 8, of the Code of Civil Procedure. I may here observe that it is not correct to say that the power of one person to represent others when there is no authority under the general law

30. (1926) 52 M L J 641.

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is based on their consent as was supposed by Kernan, J., in *Thanakoti* v. *Muniappa* (16), where he says:

"Unless the other plaintiffs were aware of the suit of plaintiff 3 and authorised him to make the claim for them, plaintiff 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit."

I think the real basis of the power to represent in such a case is derived from the action of the Court in permitting the action to go on on that basis. The consent of the others need not be obtained, *Markt & Co., Ltd.* v. *Knight Steamship Company, Ltd., Sale & Frasar* v. *Knight Steamship Company, Ltd.* (31). Examples of cases in which similar conclusion was reached are not wanting. In *Rangamma* v. *Narasimhacharyulu* (3) Sadasiva Aiyar and Moore, JJ., held that one Agraharamdar was bound by the result of a former litigation in which he was represented by another Agraharamdar and the litigation was conducted *bona fide;* but no order was obtained under Order 1, Rule 8 in that case. *Res judicata* followed because the issue raised a very general question applying to all the Agraharamdars. It might have been prudent for the Court to follow the procedure in O. 1, R. 8 in that case. But the fact that they did not follow, did not make it less *res judicata.* The decision in *Gopalacharyulu* v. *Subbamma* (4) was also a case of Agraharamdars. Wallis, C. J., and Spencer, J., held that Explanation 6 applies not only to cases to which the procedure in S. 30 applied but also to other cases and it was in terms wide enough to include accidental slips where no real prejudice has been caused. These two cases were sought to be distinguished by Mr. Ramachandra Aiyar on the ground that the parties there were not numerous and S. 30 could not in strictness be applied. He also argues that *Rangamma* v. *Narasimhacharyulu* (3) was wrongly decided. These two cases were followed in *Chenraya Goundan* v. *Athappa Goundan* (6), which was a case of trustees of a temple. In *Chandu* v. *Kunhamed* (9) it was held in a suit by a mortgagee of one share, that the decision in a previous suit on a general issue whether the paramba was partible or not bound the other sharers in a later litigation. It is true that this was overruled by a Full Bench in a later case.

3. (1916) 31 M L J 26.
4. (1919) I L R 43 M 487 : 38 M L J 493. 6. (1923) 18 L W 177.
9. (1891) I L R 14 M 324 : 1 M L J 529.
16. (1885) I L R 8 M 496 at 499.
31. (1910) 2 K B 1021 at 1039.

But the ground was that the other so-sharer who was sought to be bound when asked to join the plaintiff refused to join and when impleaded as a defendant remained *ex parte* and he was not interested in the decreeing of the prior suit. Several other cases referred to by Mr. Ramachandra Aiyar, such as for instance the decisions in *Srinivasa Chariar* v. *Raghava Chariar* (18), relying on *May* v. *Newton* (32), *Walker* v. *Sur* (33) and *Thedla Ranganayakamma* v. *Maddi Jagayya* (34), *Baiju Lal Parbatia* v. *Bhulak Lal Pathuk* (20) are not decisions holding that the absent parties were not bound in the later litigation but either granting leave under S. 30 or refusing to grant such leave. Observations occur in these cases discussing the binding nature of the decree without leave being obtained under S. 30, but they are in the nature of *obiter dicta*.

In *Muhammad Amir* v. *Sumitra Kuar* (19) Richards, C.J., and Banerji, J., held that the decision in a suit by two persons as members of the public for a declaration that certain property was waqf was binding upon the other members of the public claiming a similar declaration. All that we have got to see is whether the former suit was allowed by the Court to proceed to the end as a representative suit and whether the suit was considered by that Court in that way. If this test is satisfied, what procedure was actually followed is not strictly pertinent to the matter.

In the present case the learned Judges who referred the matter to the Full Bench observe :

"We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly under S. 30 corresponding to O. 1, R. 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the benefit of all the Vaniyars interested along with the plaintiffs to worship in the Tiruchendur Temple as alleged by the plaintiffs."

As I understand this observation, especially the portion of it using the word "impliedly" what the learned Judges meant to say is that no order purporting to be under S. 30, either expressly mentioning the section, or without mentioning it but merely with reference to it, was passed. But lower down the same page they observe :

"From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of

18. (1899) I L R 23 M 28 : 7 M L J 281.
19. (1914) I L R 36 A 424. 20. (1897) I L R 24 C 385.
32. (1886) 34 Ch. D 347. 33. (1914) 2 K B 930.
34. (1926) 101 I C 375.

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the parties appearing in the judgment we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars. The mere addition of a claim for damages does not change the nature or the character of the suit which was one for the establishment of the right of the whole community of which the plaintiffs were members. That the suit was litigated *bona fide* cannot be disputed. A large number of witnesses were examined; various documents were produced and every attempt was made to prove the case to the hilt."

Though no order was passed under S. 30 impliedly or expressly, when we remember that that section was only a section laying down a definite procedure for what was somewhat indefinite prior to 1877 but otherwise really attaining the same object as before, it is still open to the learned Judges to find whether the Subordinate Judge who tried the former suit with reference to the issues, findings, etc., meant to allow the suit to proceed in a representative capacity for the benefit of all Vaniyars. As I think there is no express finding and as it is a question of fact, we have nothing to do with the matter. I only observe that it is open to them to so find if they choose to do so with reference to the pleadings, the issues, judgment and decree.

My answer to the reference is that Explanation 6 to S. 11 is not controlled by O. 1, R. 8.

The Officiating Chief Justice.—I agree.

Beasley, J.—I agree.

A. S. V. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Mosafkanni Ravuthar and others ... *Petitioners** (*Defts.*)

v.

Doraisami *alias* Gauri Vallabha Thevar Avl., Zemindar of Sivaganga and others ... *Respondents* (*Plffs.*).

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Lease—Assignee of leasehold—Rent—Liability for—Basis and extent of—Lessee tenant-in-common—Assignee of—Liability of—Shares held in physical severalty—Shares held jointly, though actual possession with sub-tenants—Distinction.

The liability of the assignee of a lease-hold to pay rent to the landlord is primarily by reason of the privity of estate. His liability by reason

*C. R. P. No. 678 of 1922. 18th October, 1926.

of such privity arises with the assignment to him and ceases with a reassignment by him, and the liability and the privity extend to the whole of the premises covered by the assignment and no further. The assignee of a lessee tenant-in-common is, therefore, liable for the whole of the rent of the property to which his tenancy-in-common relates. If the assignee of a share holds his share in physical severalty, he is separately liable for his share, but if the sharers are jointly in possession as tenants-in-common of the whole (even if such possession is through sub-tenants) they will be jointly liable, though it will be open to them to cut down their liability by division.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Ramnad at Madura in S. C. S. No. 155 of 1920.

[This petition came on for hearing on 1st May and 12th August 1925 before their Lordships Spencer and Ramesam, JJ.]

K. V. Sesha Aiyangar for petitioners.

K. Kuttikrishna Menon for 1st respondent.

The Court made the following

ORDER :—The Subordinate Judge did not decide the questions of fact necessary to be determined before applying the law as to the liability of alienees to pay rent upon lands not in their occupation.

Certain of the defendants raised the defence that *poruppu* was being collected separately in proportion to the shares owned by them. It is clear that the village consists of 18 shares or vrithies, but it is not clear whether the owner of each of these shares is in occupation of all the other shares besides those in his name.

We must therefore call for a finding whether the village is being held by a number of share-holders each in separate possession of his own holding or whether they are all in joint possession of all the lands in the village. Finding to be returned within two months. Ten days for objections. Either side may adduce additional evidence. If it is found that each shareholder is in separate occupation of his share there will be further separate findings as to the amounts due and the amounts paid upon his holding.

In compliance with the above order, the Subordinate Judge of Ramnad at Madura submitted the following findings:—

The following issues were sent for findings by this Court·

1. Whether the village is being held by a number of share-holders each in separate possession of his own holding or

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whether they are all in joint possession of all the lands in the village.

2. If it is found that each share-holder is in separate occupation of his share, what will be the amounts due and paid upon such holdings?

Issue 1 :—The vakils on both sides stated that they have no further evidence to offer and that the evidence on record of defendants' witness No. 1 is to the effect that the share-holders are not in possession of any separate plots of land but that they divided the total produce according to their respective shares in the 3/4th village which belongs to the chatram. This is my finding on issue 1.

As a result of the finding on Issue 1, no finding on point 2 is called for.

[This petition again came on for hearing on the 26th and 27th April, 1926, after the return of the above finding of the lower Court before their Lordships Spencer and Ramesam, JJ.]

The Court made the following :

ORDER :—We are unable to accept the findings. We asked for a finding whether each share-holder was in joint possession of the whole village but we have had no answer to our question. The Subordinate Judge accepted the statement of the vakils that the evidence of D. W. 1 was that the share-holders were not in possession of any separate plots of land. D. W. 1's evidence has been printed. Nowhere in his deposition has he denied that any of the share-holders are in actual physical possession of the land. The vakils on either side are not in a position to supply us with the facts upon which the application of the law depends. But Mr. Kuttikrishna Menon, vakil for the 1st respondent, states that his instructions are that all the defendants are tenants-in-common of the whole village, raising crops and dividing the produce according to their shares. The case must go back for a finding:—

1. Whether any single individual of 16 defendants or any combination or combinations or sets of them is in separate possession of definite plots in the village?

2. Whether the land is cultivated through the tenants, and, if so, whether those tenants are lessees from only some or from all of the defendants?

3. Same as issue 2 upon which findings were called for on the last occasion. Each side may adduce fresh

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evidence. Findings to be returned by July 31st. Ten days allowed for objections.

The Subordinate Judge submitted the following findings:—

"After remand, evidence was adduced on both sides on these points. The evidence on both sides is unanimous to the effect that so far as nanja (wet land) is concerned, there has been division and ascertainment of separate shares and the sharers are separately in possession. As regards dry lands or punja, the evidence is equally unanimous that there has been no division or ascertainment of shares and that half the dry land is in possession of tenants who have got rights of occupancy and that the other half is pannai land leased to some permanent lessees for fixed rent. The lease is joint. Even the extent of the dry land has not been ascertained and there has been no attempt at division. I therefore find that, as regards dry land, no particular defendant or set of defendants is in possession of any definite plot but as regards wet land there has been an ascertainment of shares. The particular plots in possession of each defendant and the extent of rent due on each share in the village has been detailed in a written statement dated 25-9-1920. Under point one, I find that there is separate possession only as regards wet land.

As regards point 2 the evidence is clear that as regards wet land, the sharers are enjoying them through tenants but the dry lands, which are undivided, have to the extent of half, *i e.,* 12 shares, been leased by all the sharers to certain tenants under a perpetual lease. The other half is in the possession of tenants who have got right of occupancy in the land. Half of this half, *i e.,* six shares form portion of the subject-matter of the suit along with the previous half of 12 shares. The nanja lands have been leased separately by the sharer to the individual tenants. I find accordingly under point 2.

Point 3. In the first point remanded, I have found that there is separate possession as regards wet land but not as regards dry land. Though there is no separate possession of dry land the ascertainment of liability of the tenants has been made easy in this case by the statement which sets out the extent of liability of each tenant. That statement shows the liability even though the dry land is not divided. Under point 3, I find that such sharer is not in possession of his complete share of wet and dry land but the extent of liability has been stated in the additional written statement and also in the evidence as Rs. 8-8-9 per share."

[This petition again came on for final hearing on the 11th October 1926 before their Lordships Ramesam and Reilly, JJ.].

The Court delivered the following

JUDGMENTS :—*Ramesam, J.* :—The finding of the Subordinate Judge is accepted. The finding is to the effect that the wet lands are divided between the several sharers and each sharer is in enjoyment of his specific share. As to the dry lands, half of them are enjoyed by the sharers as tenants-in-com- (Ramesam, J.)

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mon by being held through permanent lessees and the other half similarly through occupancy tenants. The sharers are not in physical possession of the dry lands and practically there is little chance of their getting into physical possession. They have to collect the rent and divide it according to their respective shares. It is also clear that at the time of the inam register, Ex. IV, that is in 1864, all the lands were undivided and were being held jointly. The *poruppu* for the Chatram portion must have been paid jointly by all the sharers though it was separated from that due on the Dharmasanam portion. The question that now arises is, what is the principle of law applicable to the liabilities of the shareholders ?

We start with the fact that the original *Agraharamdars* were all Brahmins and there is none now among them and even in 1864 most of them, perhaps all relating to the Chatram portion, were alienees. It is clear now that they are all alienees. The liability of the assignee of a lessee is primarily by reason of the privity of estate. See *Monica Kitheria Saldanha* v. *Subbraya Hebbera* (1). Each sharer is therefore liable at least to the extent of his share. The further question is whether they are jointly liable and not merely severally liable for their respective shares. No doubt, in 1864, the payments must have been made jointly. But at that time they were tenants-in-common and were in joint possession and have, as will be shown lower down, been jointly liable for the *poruppu*. On this ground they must have paid the *poruppu* jointly, but since then the wet lands have been divided into separate shares and there is no joint possession. The petitioners' vakil, Mr. Sesha Aiyangar, contends that even as to the dry lands they are not jointly and severally liable. He relies on certain observations in *Venkatasubramaniyam* v. *Raja of Venkatagiri* (2), specially the observations of Krishnan, J. The point was not actually decided in that case. The contention based on the fact that some of the defendants were assignees was not raised there in the first Court and in the High Court the decision proceeded on the assumption that all the defendants were the heirs of the original lessees. The observations of Krishnan, J., in favour of the assignees were therefore *obiter dicta*. When we examine the cases referred to, none of them is quite conclusive though the inclination in these cases is in favour of the assignees. In the

1. (1907) I L R 30 M 410 : 17 M L J 258.
2. (1919) 11 L W 523.

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first English case, *Gamon* v. *Vernon* (3), the suit itself was for the proportionate share. In the other case, *Stevenson* v. *Lambard* (4), the defendant was evicted from a certain share by the paramount title of a prior lessee and it was held that the rent may be apportioned. Both these two cases were discussed at length by Greer, J., in *United Dairies* v. *Public Trustee* (5). He is of opinion that the matter was not really decided by the English authorities. He is inclined to agree with the opinion of Kenny, J., in *Dooner* v. *Odlum* (6). It is also the trend of opinion of the text-writers. See Foa on 'Landlord and Tenant', p. 469. In *Jagan Mohan Sarkar* v. *Brojendra Kumar Chakravarthi* (7), B. B. Ghose, J., seems to take the same view. The decision in *Kunhi Sou* v. *Mulloli Chathu* (8) deals with apportionment in the matter of time and it is not clear that the Judges were discussing the case of tenants-in-common in joint possession. I adopt the view of Greer, J., in *United Dairies* v. *Public Trustee* (5) and that of Kenny, J., that is, if the assignee of a share holds his share in physical severalty he is separately liable for his share and if they are jointly in possession as tenants-in-common of the whole (even if such possession is through sub-tenants) they will be jointly liable though it will be open to them to cut down their liability by division. The acceptance of joint liability in 1864 is attributable to this principle and would not prevent the assignees tenants from cutting down their liability by a later division.

Mr. Kuttikrishna Menon for the respondents contends that as a specially well-known incident of the *agraharam* tenure in Southern India all are jointly and severally liable even if there is division. He referred to several cases such as *Zamindar of Ramnad* v. *Ramamany Ammal* (9), *Sundaram* v. *Sankara* (10) and *Ellaiya* v. *Collector of Salem* (11). In some of these cases it is not clear that the tenants were assignees. In none of them the point arose directly and the point seems to have been assumed or conceded without any argument. It cannot be said by reason of cases of this kind that a customary incident has been established in Southern India

3. (1679) 2 Lev 231 : 83 E R 532.
4. (1802) 2 East. 575 : 102 E R 490. 5. (1923) 1 K B 469.
6. (1914) 2 Ir. R 411 at 415. 7. (1925) I L R 53 C 197 (F B).
8. (1912) I L R 38 M 86 : 23 M L J 695.
9. (1880) I L R 2 M 234. 10. (1886) I L R 9 M 334.
11. (1866) 3 M H C R 59 (62).

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modifying the general principle of law. I must therefore hold that each defendant is only separately liable in respect of the wet lands in his possession. The shares of the defendants are already known. As to the dry lands they are jointly liable. The only question that has to be determined now is, what is the proportion of the *poruppu* payable on the wet lands and on the dry lands?

The materials on record are not enough to determine this. The Subordinate Judge will now find on the question, how is the *poruppu* to be proportionately distributed between wet lands and dry lands? He must do this with reference to the assessment of the wet and dry lands and their market value. When he determines this, he will then divide the assessment of the wet lands between all the sharers for the three faslis in suit. He will notice in the written statement of the defendants that the shares of sharers Nos. 1 to 8, 10, 12, 13 and 15 are the same for all the three faslis and the proportions differ for the three faslis only in respect of sharers Nos. 11, 14 and 16. He will then consider the several receipts filed in the case by the defendants and allow the defendants to appropriate the payments under these receipts as they like for the dry or wet portion in each man's share and ascertain the balance due by each defendant for each fasli. A tabular statement for each of the three faslis for all the sharers would be convenient.

He will then pass decree accordingly for the respective amounts against the several defendants. The suit will be remanded for disposal according to law with reference to the above directions.

In the High Court each party will bear its own costs, In the Court below the plaintiff will get from each defendant proportionate costs with reference to the decree he obtains against that defendant. But the plaintiff need not pay any costs to any defendant.

Reilly, J.

Reilly, J. :—It is admitted that the village with which this suit is concerned has been held under the local Raja or Zamindar for a very long time in 24 shares. It appears from Ex. IV which contains a descriptive report of the village made by the Inam Commissioner and an extract from the Government Inam Register of 1864, that 6 of these shares were granted as dharmasanam on a favourable rent or *poruppu* to some Brahmins by Mahabalivan Raja at an unknown date and that the remaining 18 shares were granted in 1794 by Marudappa Sarva-

karan to certain persons on *poruppu* in connection with the endowment of a chatram at Chudiyur. Whether the profits of the 18 shares were to be the endowment of the chatram or only the *poruppu* was to be the endowment is not clear. But it appears that about 1835 the Zamindar of Sivaganga, the plaintiff's predecessor, became the trustee of the chatram, and from that time at any rate the *poruppu* of the 18 shares was treated as the endowment. The chatram part of the village is stated in Ex. IV to be distinct from the dharmasanam part. This suit is concerned only with the 18 shares of the chatram part, and the plaintiff sues as trustee of the chatram for the recovery of the balance of *poruppu* for 3 faslis. The defendants are the present holders of the 18 shares. The plaintiff contends that the defendants are jointly and severally liable for the whole *poruppu* on the 18 shares. The defendants contend that each of them is liable only for the *poruppu* on the share or shares held by him.

(2) From Ex. IV it appears that the 18 shares were equal but that the land covered by them was not then divided. There is also a remark in Ex. IV.

"*Poruppu* is paid on the number of vrithies equally and permanently."

But that remark appears to be made with reference to the two divisions of shares—viz., 6 dharmasanam shares and 18 chatram shares—and it will be noticed that the area of wet and dry land granted as dharmasanam is exactly 1|3 in each case of the area granted to the chatram. I do not agree with Mr. Sesha Aiyangar who appears for the defendants that the remark means that *poruppu* was being paid to the Zamindar on each of the 18 shares individually. I understand it to mean that the *poruppu* was fixed permanently and was paid proportionately on the 6 dharmasanam shares and the 18 chatram shares. Ex. IV further shows that at its date the chatram 3|4 of the village to which the 18 shares relate was in the possession of 9 persons, to whom the 18 shares had passed from the original grantees or their successors by sale. The defendants are the assignees or heirs of those 9 persons. D. W. 1 the only witness examined for the defendants states that the shares of those 9 persons are not shown in the inam register because they were "undivided", by which he can only mean that the land held by them was undivided, as some of them were Hindus and others Muhammadans. In Ex. IV doubt is

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thrown upon the right of the original grantees or their successors to sell the 18 shares; but there is no doubt that it was by purchase that the 9 persons acquired the 18 shares which they held in different proportions. In these circumstances it is clear that the 9 persons must have held the land covered by the 18 shares as tenants-in-common. That being so, I see no reason to doubt that they were jointly and severally liable for the whole *poruppu* on those shares. It is not suggested by the defendants that the 9 persons were trespassers. On the contrary the defendants' case is that these 9 persons were the lawful assignees of the original grantee, who held on a perpetual lease subject to a covenant to pay the favourable rent or *poruppu*. By the assignments privity of estate between the 9 persons and Zamindar, as the trustee to whom the *poruppu* had to be paid, had been established. As their tenancy-in-common gave each of them an interest in every part of the 3|4th of the village covered by the 18 shares, the privity of estate between each of them and the Zamindar must have extended to the whole of that area. If that view is correct, then the liability of each of them for the *poruppu* must have been equally extensive. It was only by privity of estate that they were liable to the Zamindar for the *poruppu*. The liability of the assignee of a lease-hold by *reason* of privity of estate to pay rent to the landlord arises with the assignment to him and ceases with a re-assignment by him, and the liability and the privity extend to the whole of the premises covered by the assignment and no further. On those principles the assignee of a lessee tenant-in-common must be liable for the whole of the rent of the property to which his tenancy-in-common relates. In *United Dairies* v. *Public Trustee* (5) Greer, J., stated that he was inclined to this view, and he quotes the opinion of Kenny, J., in *Dooner* v. *Odlum* (6) to the same effect. In *Jagan Mohan Sarkar* v. *Brojendra Kumar Chakravarthi* (7) the majority of a bench of 5 Judges adopted this view as a step towards their decision in that case; one of the dissenting Judges explicitly agreed with them on this point, and the other learned Judge contented himself with resting on a previous judgment of his own in which this point was not discussed.

On the case being sent back to him, the Subordinate Judge has now found that the wet land in the chatram 3|4 of

5. (1923) 1 K B 469. 6. (1914) 2 Ir. R 411 at 415.
7. (1925) I L R 53 C 197 (F B).

the village has been divided among the defendants and that they are in possession of separate plots of it, but that, so far as they are concerned, the dry land in the chatram part of the village is undivided. The Subordinate Judge has not found when the division of the wet land was made; but it is clear that it was done after the date of Ex. IV. The finding is not disputed before us; nor is it disputed that the division of the wet land was made by the defendants or their predecessors-in-title without reference to the Zamindar and before the faslis to which this suit relates. When the defendants or their predecessors-in-title divided the wet land among themselves and took separate possession of separate plots according to the number of their shares, there was in effect re-assignment to each sharer among them by all the other sharers of their interests in the land allotted to him. By that re-assignment the privity of estate with the Zamindar of each sharer in respect of the whole wet land in the chatram 3|4 of the village other than that allotted to him came to an end and a new exclusive privity of estate between him and the Zamindar arose in respect of the separate wet land allotted to him. From that moment his liability as a tenant-in-common to pay rent for the whole wet land ceased, and he became liable, so far as the wet land was concerned, only for the rent on the land allotted to him at the division. Had the defendants been heirs of original lessee tenants-in-common, they could not of course have shuffled off their joint and several liability for the whole rent in this way by division among themselves without their lessor's consent. But, as things stand, in respect of wet land for the faslis in question the Zamindar is entitled to get from each of the defendants only the rent due on his particular holding. For the dry land on the other hand the defendants as tenants-in-common are still jointly and severally liable for the whole rent. The fact that no part of the dry land is in the actual possession of any of them but that it is held under them by sub-tenants some of whom have occupancy right and others have a perpetual sub-lease, does not, as Mr. Sesha Aiyangar has suggested, in any way affect the position of the defendants towards the Zamindar as tenants-in-common of the whole of the dry land.

It should not be difficult now for the Subordinate Judge to dispose of the suit if he can determine how much of the whole *poruppu* is attributable to the wet land and how much

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to the dry land. If, as appears probable from the defendants' contentions, the separate plots of wet land held by them are proportionate in value to the shares or fractions of shares out of the 18 held by each defendant, the apportionment of the *poruppu* on the wet land among the defendants will be a simple matter of arithmetic. It is probable that each defendant will wish to appropriate what he has paid already, if anything, first towards what is due on his separate wet land. If so, whatever any defendant has paid in excess of the amount due on his separate wet land will go towards the amount due from all the defendants for the dry land. For any balance due on wet land the Subordinate Judge will make a decree against the defendant concerned individually, and for any balance due on the dry land he will make a decree against all the defendants.

I agree with the proposal of my learned brother that the suit should be remanded to the Subordinate Judge for fresh disposal on these principles and also with his proposal in respect of costs.

A. S. V. *Order reversed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Desu Rattamma ... *Appellant* (2nd Deft.)*

v.

Kakaraparthi Krishnamurthi and another ... *Respondents (Plff. & 1st Deft.).*

Rattamma v. Krishnamurthi.

Contract—Sale of goods—Advance paid by purchaser—Contract falling through due to default of purchaser—Right to recover advance

A sum of money paid as advance by the purchaser to the vendor in respect of the sale of goods can be recovered by the purchaser, even though the transaction of sale fell through owing to the purchaser's default, unless the vendor proves a contract express or implied that the money paid as advance should be treated as security for the purchaser's fulfilment of the bargain, and as such liable to be forfeited on his default.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Bezwada in A. S. No. 36 of 1924 presented against the decree of the Court of the District Munsif of Bezwada in O. S. No. 158 of 1922.

C. Rama Rao for appellant.

L. S. Veeraraghava Aiyar for 1st respondent.

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*S. A. No. 1284 of 1924. 27th April, 1927.

Rattamma v. Krishna murthi.

Jackson, J.

The Court delivered the following

JUDGMENT :—*Jackson, J.*—Plaintiff sued for recovery of Rs. 1,497-5-0, advances made by him as purchaser to defendants as vendors in respect of a sale of gunnies and damages. The lower courts have found that the transaction fell through owing to plaintiff's default. Therefore, there is no question of damages but the lower appellate court has decreed the return of plaintiff's advance of Rs. 750, though without interest, except from date of suit. The second defendant appeals, 1st defendant files a memo. of objections.

The question for determination is, strictly speaking, one of fact, whether there was an implied contract between the parties that the money paid in advance should be treated as security for plaintiff's fulfilment of the bargain and as such liable to be forfeited on plaintiff's default. There can only be an implied contract, because no express stipulation is to be found in the agreement itself, Ex. A, which merely runs "You have paid advance Rs. 750 at Rs. 15 per bale. Hence the same has been received."

Looking at the language of this instrument, can it be inferred that the advance was made as a guarantee for the performance of the contract?

In the English cases it has usually been so inferred that a deposit is paid as guarantee. In *Collins* v. *Stimson* (1) and *Howe* v. *Smith* (2) the word 'deposit' has been held to carry that inference. Lord Bowen in the latter case observes:

"It is a deposit . . . . . and the special clause in the contract does not deprive the deposit of the character which it would bear if there were no special clause . . . . a deposit in the ordinary parlance of businessmen is a security for the completion of the purchase."

Then Lord Fry explains how that common understanding has grown up deriving this idea of security from Phœnician and Roman sources. So that it may be said that if the money paid in advance is intended to be a deposit of this character and the buyer is unwilling to pay for the goods, the seller may retain the deposit, *c.f.*, Halsbury's Laws of England, Vol. 25, page 237. Benjamin on Sales is equally clear as regards an undoubted deposit.

"A deposit is no doubt not recoverable" (Ed. VI, p. 1084).

But,

"where part of the price has been paid otherwise than as a deposit (and, as in this case, there is no question of damages) the buyer may perhaps be entitled to recover the part of the price paid" (p. 1090).

1. (1883) 11 Q B D 142. 2. (1884) 27 Ch. D 89.

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That in sales of goods apart from conveyances of real property it is not customary to give money paid in advance the peculiar characteristic of a deposit is laid down by the learned Chief Justice of this Court in *Satyanarayanamurti* v. *Erikalappa* (3).

"I can content myself with saying that it is never the practice in mercantile contracts to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit."

This, of course, is not, as was suggested, a ruling running counter to the established English cases, but a statement that in mercantile contracts in England as a matter of fact it is not inferred that money paid in advance is, in the absence of words to that effect, a deposit by way of security.

That being so, it would be indeed hazardous to infer that in the Kistna District where a vendor accepts what he calls 'advance' he is taking a deposit clothed with all the implications which that term has acquired in the West through the course of European civilization. Far safer is the finding of the learned Subordinate Judge that, as the defendants neither alleged nor proved that the advance was earnest money and as it was treated merely as part payment of purchase money in the account books of the defendants, it is not a deposit in the strict sense of the word. Even if that finding can be canvassed in second appeal, there is no reason why it should be reversed.

In a case of this sort which turns on the interpretation of a particular contract, little is to be gained by considering how Courts have interpreted other contracts. In *Manian Pattar* v. *The Madras Railway Co. by its Agent and Manager* (4) and *Natesa Aiyar* v. *Appavu Padayachi* (5) there was a clause of forfeiture; in *The President, Vellore Taluk Board* v. *Gopalaswami Naidu* (6) the deposit was in terms by way of security; it was a deposit as earnest money in *Roshan Lal* v. *The Delhi Cloth and General Mills Co., Ltd., Delhi* (7) and also in *Muhammad Habib-Ullah* v. *Muhammad Shafi* (8). In *Bishan Chand* v. *Radha Kishen Das* (9) it is also found that the money was paid as a guarantee, for the ruling is based on *Ex parte Barrell. In re Parnell* (10) which proceeds on that assumption.

3. (1925) 50 M L J 150. 4. (1905) I L R 29 M 118 : 16 M L J 37.
5. (1913) I L R 38 M 178 : 24 M L J 488.
6. (1913) I L R 38 M 801 (F B). 7. (1910) I L R 33 A 166.
8. (1919) I L R 41 A 324. 9. (1897) I L R 19 A 489.
10. (1875) L R 10 Ch. App. 512.

Therefore the finding of the lower court in this matter is confirmed and the appeal is dismissed with costs.

The 1st respondent in a memo. of objections claims interest on the advance ordered to be returned and also damages. It is stipulated in Ex. A that the advance should bear interest at ½ per cent. per mensem. The lower appellate court disallows interest because it was not claimed apart from damages. The mere fact that damages were also wrongfully claimed can hardly invalidate a legitimate claim for interest. So far, the memo. of objections must be allowed. 1st respondent is entitled to interest at the contract rate. But there is no reason for holding, nor was it pressed in argument that the lower courts have erred in disallowing damages. So far the memo. of objections fails. Therefore 1st respondent will not have the costs of this memorandum.

Devadoss, J. :—I agree.

N. S. *Appeal dismissed, Memo. of objections partly allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT :—LORD DARLING, LORD WARRINGTON OF CLYFFE, MR. JUSTICE DUFF AND SIR LANCELOT SANDERSON.

Thakur Shiam Sundar Singh ... *Appellant** (*Deft.*)

v.

Thakur Jagannath Singh ... *Respondent* (*Plff.*).

P. C. — Shiam Sundar Singh v. Jagannath Singh.

Indian Succession Act (X of 1865), Ss. 54, 71—Oudh Estates Act (1869), *S. 19—Will of Oudh* taluqdar—*Bequests in favour of attesting witnesses—Oral evidence showing that the legatees did not sign as attesting witnesses, but signed the will for some other purpose.*

A will executed by an Oudh *taluqdar* contained the following clause (paragraph 8) :—"I have executed this will with the consent of all my sons and have got them to sign it as witness with this very purpose so that this will may be acted upon fully and they may not quarrel among themselves after my demise". The testator's sons accordingly appended their signatures to the will. *Held,* that although the position of the signatures created a presumption that they had been attached by the sons as attesting witnesses, such presumption was capable of being rebutted by parole evidence narrating what actually occurred at the time of the execution of the will. *Held also,* on the evidence, and agreeing with the concurrent findings of the Indian Courts as to the credibility of the witnesses, that the sons did not sign the will as attesting witnesses, and therefore the

*P. C. Appeal No. 6 of 1927. 18th October, 1927.

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bequests in their favour were not void under S. 54 of the Indian Succession Act, 1865 (as read with S. 19 of the Oudh Estates Act, 1869).

The manifest object of paragraph 8 of the will was to secure the co-operation of the testator's sons in carrying out the dispositions of the will, and they attached their signatures as concurring in the declaration contained in this paragraph, and with a view of avoiding dissensions in the future. To hold, under such circumstances, that the sons had signed the will as attesting witnesses, would be to defeat the very object of the clause itself and to frustrate the obvious purpose of the testator in making it part of his will. The provisions of S. 71 of the Succession Act, 1865, relied on.

Judgment of the Judicial Commissioner affirmed.

Consolidated Appeal No. 6 of 1927 by special leave from the judgment and decree of the Court of the Judicial Commissioner of Oudh (Dalal, J. C. and Wazir Hasan, A. J. C.), dated the 25th November, 1924, affirming a decree of the Subordinate Judge of Partabgarh, dated the 27th August, 1923.

The facts of the case appear sufficiently from the judgment of their Lordships, and also from the report in the Court below (*see* 85 I. C. 558).

Ss. 54 and 71 of the Indian Succession Act, 1865 (now replaced by Ss. 67 and 84 of the Succession Act of 1925) are as follows:—

S. 54: Effect of gift to attesting witness.—A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation.—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

S. 71 : Which of two possible constructions preferred.—Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former shall be preferred.

Under S. 19 of the Oudh Estates Act, 1869, S. 54 of the Indian Succession Act, 1865, is made applicable to all wills and codicils made by any *taluqdar*.

The main question for determination in the appeal to the Privy Council was whether a certain will was valid so far as certain legatees were concerned, and the question depended on the fact whether or not the legatees signed the will as attesting witnesses.

It was concurrently found as a fact by both Courts in India that the legatees did not sign the will as attesting witnesses, but that they signed it by way of giving their consent to the act

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of the testator who was their father, and consequently both Courts held that the gifts to the legatees were not inoperative or void.

The testator was one Thakur Drigbijai Singh, a *taluqdar*. The will was signed by eight witnesses including the four sons of the testator, but, on the face of it, it did not appear which of the witnesses signed as attesting witnesses.

De Gruyther, K. C. and *Dube* for appellant.

Dunne, K. C. and *S. Hyam* for respondent.

18th October, 1927. Their Lordships' judgment was delivered by

Mr. Justice Duff.

MR. JUSTICE DUFF :—This is a consolidated appeal from two decrees, both of the 25th of November, 1924, of the Court of the Judicial Commissioner of Oudh at Lucknow, which were pronounced in an appeal from the Subordinate Judge of Partabgarh. The question raised by the appeal is whether certain legacies in a will of the late Drigbijai Singh, a *taluqdar* of Athgawan, in the District of Partabgarh, are valid, and the answer to this question must be governed by the determination of the issue, which was the real issue in the Courts below, whether or not the legatees entitled to the benefit of these legacies, if valid, signed the will as attesting witnesses. The Court of the Judicial Commissioner held, affirming the decision of the Subordinate Judge, that this issue must be determined in favour of the respondents.

The testator, by his will, appointed his eldest son, Lal Bahadur Singh, as *taluqdar* after him, and gave to each of his three younger sons, Jagannath Singh, Ran Bahadur Singh, and Jang Bahadur Singh, certain villages out of the *taluqa,* to be held absolutely with heritable and transferable rights as under-proprietors if and when they or any of them wished to separate from their eldest brother; but "so long as they live in union among themselves with the *taluqdar,*" the *taluqa* was to remain undivided, and the income therefrom was to be "spent on the whole family," after paying Government and village dues.

The testator also directed the division of his movable property in case of a separation, and by paragraph 8 he declared:

"I have executed this will with the consent of all my sons and have got them to sign it as witness with this very purpose so that this will may be acted upon fully and they may not quarrel among themselves after my demise."

As to the genuineness of the will there is no dispute. Admittedly, also, disregarding the signatures of the testator's four

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sons, the execution of the will is attested by a sufficient number of attesting witnesses, in conformity with the law in force in the Province of Oudh.

As would appear from an inspection of the translation of the will, which is the plaintiff's Exhibit 1, as reproduced in the record, it was signed by the testator as "executant," and below the testator's signature, after the signature of one of the witnesses, who, it is not disputed, was an attesting witness, there are the signatures of his four sons, and, below them, the signatures of three other persons who also admittedly signed as attesting witnesses. In the margin on the left of these signatures, and just above the signature of the first attesting witness, appears the word "Witnesses." The appellant, who is the son of the eldest son of the testator, on the strength of a passage in the judgment of the Subordinate Judge, contended that in the original will the word "Witness" appears opposite each of the signatures below the testator's, including those of the sons. As in their Lordships' opinion it is immaterial, for the purpose of deciding the question before them, whether or not this was the form of the original document, it may be assumed that the appellant's contention upon this point is well founded.

The will is dated the 17th of December, 1886, and the testator died in February, 1889. In May, 1889, the name of the eldest son, Lal Bahadur Singh, was, pursuant to the dispositions of the will, inserted in the Mutation Register, in place of that of the testator. The eldest son having died in May, 1912, a joint application was made in the following July by the appellant and his three uncles (including the two respondents) in the Tahsildar's Court for mutation of names and the substitution of the appellant's name for that of his father. Mutation was duly effected in conformity with this application.

Down to the death of Lal Bahadur Singh, his three younger brothers had lived in union with him, and after his death these three brothers, uncles of the appellant, continued to live with the appellant in joint family until the year 1914. In July of that year the youngest son of the testator decided to separate from the joint family, and an application by him to the Tahsildar's Court for the substitution in the Register of his name in lieu of that of the appellant, in respect of the villages bequeathed to him under the will, was not contested by the appellant, and accordingly was granted.

In June, 1921, the respondents having decided to separate from the joint family, applications were filed by them, request-

ing mutation of their names in respect of the villages to which they were severally entitled under the terms of the will. The appellant having raised the objection that the applicants ought first to establish their title by a decree of the Civil Court, the applications were dismissed ; and the respondents then, in May, 1922, instituted the suits out of which this appeal arises.

The Subordinate Judge held that the testimony of the three surviving sons of the testator as to the circumstances connected with the execution of the will must be accepted as credible testimony. The effect of this testimony, as the learned Judge states it, was that the testator, their father, had summoned his four sons to his presence, and, having explained that he had made a will leaving his property to them, asked them to attach their signatures to the will, not as attesting witnesses, but in token of their consent, with a view to avoiding disputes after his death ; and that they attached their signatures, pursuant to this request. The Subordinate Judge accordingly found, and with him the Appeal Court agreed, that the sons did not sign the will as attesting witnesses.

Before their Lordships' Board, counsel for the appellant admitted that the oral testimony narrating what occurred at the time of the execution of the will was admissible in point of law, and, indeed, as will be seen, upon it his substantive contention was founded; nor did he argue that there was any ground upon which the appellant could ask for a reversal of the concurrent findings of the Indian Courts as to the credibility of that testimony. His contention was that, although the position of the signatures created only a presumption that they had been attached by the legatees as attesting witnesses, which presumption might be rebutted by parole evidence as to what actually occurred, still, since the signatures were by reason of their position *ex facie* signatures of attesting witnesses, that fact, when coupled with the fact disclosed by the oral evidence that they were placed there in compliance with the testator's request, was sufficient to constitute the attaching of the signatures an attestation in point of law; and that consequently all questions of intention, whether of the testator, or of the persons who signed their names, were without relevancy.

As touching the effect of the evidence adduced on behalf of the respondents concerning what actually occurred at the execution of the will, their Lordships have no hesitation in concurring in the view of all the Courts in India; nor can there be, in their opinion, any doubt as to the character of the acts of the

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testator's sons in placing their signatures upon the document, when the terms of the will itself and the facts disclosed by that evidence are taken into account. The testator himself, by paragraph 8, which is quoted above, had declared his intention, that paragraph, it is true, is not worded with the precision that might have been desired, but it would be a strange thing to give effect to it in such a way as to frustrate the obvious purpose of the testator in making it part of his will.

Its manifest object was to secure the co-operation of his sons in carrying out the dispositions of the will, and to do that by inserting in the will a formal declaration that his sons, by appending their signatures thereto, had concurred in those dispositions. By reading the clause as declaring that the sons had signed the will as attesting witnesses, one would ascribe to it a meaning according to which it would not only defeat the object of the clause itself, but nullify the distribution of his property which the testator was seeking to bring about in making his will. The more reasonable and natural reading would appear to be that the sons had attached their signatures as concurring in the declaration contained in this paragraph; and this latter construction (under which this particular declaration would take effect, together with the will as a whole) seems to be enjoined upon the Courts by S. 71 of the Succession Act.

The issue as to the character of the acts of the respondents does not for its determination depend upon any conclusion touching the nature of an undisclosed purpose or intention. The witnesses agree that, while the testator invited others to sign as attesting witnesses, he addressed no such invitation to the sons, but asked them explicitly to sign for the special purpose of expressing their consent, with the view of avoiding dissensions in the future. The evidence, once it is accepted, shows that the act of each of them was, openly and palpably, with the knowledge of all present, the act of expressing consent, and nothing else. Their Lordships concur in the view of all the Courts below that in such circumstances the signers were not attesting witnesses within the meaning of S. 54 of the Succession Act.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondent : *Barrow, Rogers & Nevill.*

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* SIR KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

G. Martirosi ... *Appellant**

v.

A. K. C. T. Subramaniam Chettiar ... *Respondent.*

F. B.
Martirosi
v.
Subramaniam
Chettiar.

Indian Arbitration Act (IX *of* 1899), *Ss.* 12 *and* 13—*Reference to two arbitrators in pursuance of clause in partnership deed—Disagreement between the two arbitrators—Appointment of umpire—Ex parte award by umpire—Court remitting it to umpire to take evidence and give revised award—No time fixed for submission—Umpire submitting award after* 3 *months—Application to enlarge time for the submission of award—Power of Court to extend time after delivery of the award—Order dismissing application to enlarge time—If a "judgment"—Letters Patent* (*Madras*), clause 15 —*Appeal.*

In cases where an award is remitted for the decision of the arbitrators or umpire without fixing any time for the return of the award, the Court has power to extend the time fixed by S. 13 of the Arbitration Act after the arbitrators or umpire have, after the remission, given their award.

Raja Har Narain Singh v. *Chaudarain Bhagwant Kuar,* (1891) L R 18 I A 55 : I L R 13 A 300 (P C) distinguished.

Per Kumaraswami Sastri and *Curgenven, JJ.* (*in the Order of Reference*).—The disputes between the appellant and the respondent were referred to two arbitrators, one nominated by each party in pursuance of a clause in their partnership deed. The arbitrators did not agree and an umpire was appointed. He passed an award which was *ex parte.* This was remitted by the Court to the umpire with directions to give an opportunity to the other side to appear, to adduce evidence and to pass an award on taking all the evidence. The umpire delivered his revised award more than 3 months after the order remitting the award to him. The respondent applied to the Court to set aside this award on various grounds one of them being that, as no time was fixed in the order remitting the award, the umpire had to submit his award in three months as required by S. 13 of the Arbitration Act and that, as he did not do so, the award was invalid. To get over this difficulty, the appellant applied to the Court to enlarge the time for the submission of the award remitted to the umpire. The Court dismissed this application to enlarge the time. The appellant preferred an appeal against this order of dismissal.

Held, that the order dismissing the application to enlarge the time was a "judgment" within the meaning of clause 15 of the Letters Patent, as the effect of the order would be to put an end to all further proceedings in the matter, the award being invalid and of no legal effect unless time was extended, and that therefore the appeal was maintainable.

Tuljaram Rao v. *Alagappa Chettiar,* (1910) I L R 35 Mad. 1 : 21 M L J 1 (F. B.) and *Ramachandra Gangadhar* v. *Mahadev Moreshwar,* (1917) I L R 42 B 260 referred to.

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*O. S. Appeal No. 120 of 1925. 21st February, 1927.

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On appeal from the judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated the 13th day of October, 1925, and passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court.

Nugent Grant instructed by *C. Rajamanikkam* for appellant.

P. Venkataramana Rao for respondent.

The Court (The Officiating Chief Justice and Mr. Justice Curgenven) made the following

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ORDER OF REFERENCE TO A FULL BENCH :—*The Officiating Chief Justice* :—This is an appeal against an order of Srinivasa Aiyangar, J., refusing to enlarge the time for the submission of an award remitted to the umpire. The application was made under S. 13 of the Arbitration Act. The facts that led up to the application are shortly these. The appellant and the respondent entered into partnership under a partnership deed which provided that in case of disputes between them the matter should be referred to arbitrators. Disputes arose shortly after the partnership, and the matter was referred to two arbitrators, one nominated by each party, and as the arbitrators could not agree, Mr. Vaz, a Barrister-at-law of this Court, was appointed umpire. He passed an award which was *ex parte* and the award was filed in this Court. It was remitted to the umpire with directions to him to give an opportunity to the other side to adduce evidence and to pass an award on taking all the evidence. The order of the Court remitting the award is dated the 17th of September, 1924. Both parties appeared before the umpire and the hearing was closed on or about the 26th of April, 1925 shortly before the closing of the High Court for the midsummer recess. Mr. Vaz delivered his award on the 2nd of August, 1925. An application was made by the respondent to set aside the award on various grounds, one of them being that, as no time was fixed in the order remitting the matter for the re-consideration of the umpire, he had to submit his award in three months as required by S. 13 of the Arbitration Act and that he not having done so the award is invalid. To get over this difficulty the appellant made an application to the Court that the time for the delivery of the award remitted may be enlarged and extended up to the 3rd of August, 1925. The learned Judge dismissed the application for enlarging the time on the ground that no case was made out for enlarging the

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time and that, even if any such case was made out, he had no power to do so.

A preliminary objection has been taken that no appeal lies against the order on the ground that the order of refusal to extend the time does not amount to a judgment within the meaning of clause 15 of the Letters Patent. The definition of the word "judgment" within the meaning of clause 15 of the Letters Patent has, I think, been settled by the decision of a Full Bench of this Court in *Tuljaram Row* v. *Alagappa Chettiar* (1), where all the previous decisions of this and other Courts have been reviewed. Sir Arnold White, C. J., observes as follows:—

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

This view has been followed in all the later cases and I need only refer to the decision of Sir Murray Coutts Trotter, C. J., and Ramesam, J., in *The Official Assignee of Madras* v. *Ramalingappa* (2), where the learned Chief Justice, after referring to the observations of Sir Arnold White, C. J., in *Tuljaram Row* v *Alagappa Chettiar* (1) observes as follows:

"Applying that and endeavouring as best as I can to see what is its true application, I think it is this, that a determination, call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto,* is a judgment and is appealable; but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause."

Ramesam, J., observes:

"Having regard to the fact that in the case before us no substantial right of the defendants has been adversely affected by the order under appeal, I would say that it does not fall on the judgment side of the line."

In the present case, the position is that unless the time is extended, the award would be invalid and of no legal effect. It could not be enforced by the appellant in whose favour it has been made. An application was made by the respondent

1 (1910) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1925) I L R 49 M 539 : 50 M L J 361.

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to set aside the award on this ground and, if nothing more was done, the Court was bound to set it aside under S. 13 of the Act. To validate the award it was necessary in law to get an order and the refusal order to extend the time would without more put an end to the validity of the award and to any proceedings which the appellant was entitled to take under the Arbitration Act to enforce it. Under these circumstances it is difficult to see how it can be said that the order of refusal is not a judgment. It is not as the respondent's vakil contends merely a step towards obtaining a final adjudication of the award but is a condition precedent to the Court entertaining the award at the instance of the appellant and making any adjudication on it. Reference has been made by Mr. Venkataramana Rao to *Govind Lal Das* v. *Shiba Das Chatterjee* (3), where it was held that the refusal of an application to excuse the delay in the presentation of a Second Appeal under the Limitation Act is not appealable under clause 15 of the Letters Patent, as such an order does not amount to a judgment. I may state that this decision affirms and proceeds on the view taken by Sir Richard Couch in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (4), where the learned Judge observes:

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability."

Sir Arnold White, C. J., and the learned Judges who formed the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (1) considered this definition too narrow. Sir Arnold White, C. J., observes:

"I am not prepared to say, as was held in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (4) and in *Sonbai* v. *Ahmed Bhai Habibbhai* (5), it must be a decision which affects the merits by determining some right or liability. I think the decision may be a judgment for the purposes of the section, though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

There is on the other hand a decision of the Bombay High Court in *Ramchandra Gangadhar* v. *Mahadev Moreshwar* (6), where it has been held that such an order would amount to a judgment. Heaton, J., observes as follows:—

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
3. (1906) I L R 33 C 1323. 4. (1872) 8 Beng. L R 433.
5. (1872) 9 B H C R 398. 6. (1917) I L R 42 B 260.

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"It is argued that the order of a single Judge refusing to excuse the delay is not a judgment within the meaning of clause 15 of the Charter of this High Court and that therefore no further appeal lay. But seeing, as I have said, that the order had the very drastic effect of dismissing or rejecting the appeal, it seems to me it must be taken to fall within the meaning of the word 'judgment' as used in clause 15, and I think therefore that there is no objection to our disposing of this appeal on its merits."

I am of opinion that if we take into consideration the substance and not merely the form of the application the effect of the order of refusal appealed against would be to put an end to all further proceedings in the matter and that such an order would be a judgment within the meaning of clause 15 of the Letters Patent. I overrule the preliminary objection.

The next question for consideration is whether the learned Judge was right in refusing to extend the time even assuming he had power to do so, as the decision on this point, if against the appellant, would render it unnecessary to consider whether the learned Judge had power. It is not disputed that both parties appeared and went on before the umpire without taking any objection as to the expiry of the time limited under S. 13 of the Arbitration Act. What appears to be probable is that the parties as well as the umpire overlooked the fact that the order remitting the matter for the consideration of the umpire did not specify any time within which the award was to be returned and that, under S. 13, the law imposes a limit of three months. It is not possible to explain their conduct on any other assumption but that, having overlooked this provision, they all thought that no time limit was necessary. Otherwise, the petitioner or the umpire would easily have got an order for extension of time. There being no default on the part of the petitioner in asking for an extension of time, it is difficult to see on what ground we can refuse to exercise the discretion in enlarging the time. The learned Judge observes:

"I do not know whether the impression produced on the mind of a Judge on a cursory perusal of the award could be made a reason for either granting or refusing an extension of time. But I am free to confess that in this case, having perused the award itself, I am not satisfied with the award in such a manner as to make me feel that it will be the duty of the Court to extend the time to render it legal, valid and binding between the parties."

I do not think that in an application to extend time, the question as to the propriety of the award should be an element to be taken into consideration as no argument is addressed to the Court on the merits during the stage of an application to

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extend the time, the only question before the Court being whether reasonable ground has been made out for extension. The proper time to object to the award on the ground that it is not a proper one is at a later stage when the award comes on before the Court under the Arbitration Act for steps to be taken to enforce it. I may also point out that in the present case the proceedings before the arbitrators and the umpire had been going on for nearly three years and it will be a great hardship should the petitioner through no fault of his own be compelled to take proceedings in Court especially as the respondent took no objection to the expiry of the time at any time during the pendency of the proceedings before the umpire. I think that, if the Court had power to extend the time, it ought to have been extended.

The next question is as to whether the Court has power. Ss. 12 and 13 are the relevant sections. S. 12 says:

"The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not."

S 13.—(1) "The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire (2) Where an award is remitted under sub-section (1), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award."

These sections are taken from the English Arbitration Act. S. 9 of the English Arbitration Act corresponds to S. 12, almost word for word, the only difference being that whilst in S. 12 we find

"may from time to time be enlarged by order of the Court,"

S. 9 of the English Act says:

"may from time to time be enlarged by order of the Court or a Judge."

S. 10 (2) runs as follows:—

"Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

So far as the decisions of the English Courts go, the Court has power to extend the time when an award is remitted even though the application is made after three months had expired. The law is thus stated in Halsbury's Laws of England, Vol. 1, page 464, Art. 975:

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"In every case the Court can enlarge the time for making an award. This power can be exercised not only after the time for making the award has already expired but even after the award has been made and thus an award which was, at the time that it was made, made valid and enforceable."

Reference has been made to *Lord* v. *Lee* (7). That was a case under the Common Law Procedure Act of 1854 and there is not much difference between the provisions of that Act and the English Arbitration Act so far as the question we are considering is concerned. It was held in that case that the Judge had power to enlarge the time after the award had been made and that the effect of the enlargement was the same as if it had been made by consent of parties, viz., to ratify what had been previously done by the arbitrator without authority. In *Knowles and Sons, Ltd.* v. *Bolton Corporation* (8) the same question arose under the Arbitration Act and it was held that S. 9 of the Arbitration Act of 1889 gave the Court power to extend the time for making the award even though the time for making the award had expired. This award was under the provisions of the Public Healths Act of 1875 and under S. 180 of the Act it was stated that the time for making the award by an arbitrator under the Act shall not in any case be extended beyond a period of two months from the date of the submission and that the time for making the award by an umpire shall not in any case be extended beyond a period of two months from the date of the reference of the matter to him. The question arose whether the Court had power to extend the time after the award was made. *Lord* v. *Lee* (7) was referred to and approved.

Turning to the cases of the Indian Courts it was held by Sir Walter Schwabe, C. J., and Wallace, J., in *Louis Dreyfus & Co.* v. *Rajagopal Aiyar* (9), that under S. 12 of the Arbitration Act there was power in the Court to extend the time even though the award had been completed. There is no reference made to any decision either of the Indian or English Courts. Sir Walter Schwabe on this point simply observes:

"As regards the first point, there is no power in arbitrators to extend their own time after their time has expired; but there is power undoubtedly in the Court under S. 12 of the Indian Arbitration Act to extend the time even though the award has been completed".

In *Tejpal Jamunadas* v. *Nathmull and Co.* (10) Sanderson, C. J., and Woodroffe, J., took a similar

7. (1868) L R 3 Q B 404.
8. (1900) L R 2 Q B 253.
9. (1922) 16 L W 657.
10. (1919) I L R 46 C 1059.

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view. In *Shib Krishna Dawn & Co.* v. *Satish Chunder Dutt* (11), Harrington, J., held that the Court had no power to extend the time so as to validate an award which had been made after the time allowed by the Court had expired. This case, however, was not under the provisions of the Arbitration Act but under the provisions of the Civil Procedure Code.

It seems to me that if the Court could extend the time under S. 12 even after the delivery of the award, there is no reason why it should not have power to do so under S. 13. I do not think that the absence of the words "whether the time for making the award has expired or not" in S. 12 necessarily shows that the legislature intended to limit the Court's power when an award is remitted. There is no reason why the power should be limited. On the contrary it seems to me that once the award is in Court and is remitted the Court being seised of the matter ought to have full power to act in the matter of extensions of time. It seems to me that unless we can hold that the moment an award is delivered either under S. 12 or S. 13 the Court's power to extend the time ceases it is difficult to distinguish the powers under one section from those under the other. The authorities on this point are not uniform. In *Shib Krishna Dawn & Co.* v. *Satish Chunder Dutt* (11) it was held by Harrington, J., that S. 148 would not apply if the award had been delivered. The learned Judge observes:

"On behalf of the petitioner it is argued that S. 148 alters the law laid down in that case [*Raja Har Narain Singh* v. *Chaudarin Bhagwant Kuar* (12)] because it enables the Court to enlarge the time for the doing of any act prescribed or allowed by the Code, notwithstanding that the period originally fixed has expired. I agree with the view that if the time had expired, and no award had been made, that section does give the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but it appears to me that the section does not enable the Court to extend the time for the doing of a particular act when in truth and in fact the act has already been done."

In *Co-operative Hindustan Bank, Ltd.* v. *Bhola Nath Borooah* (13) Chitty, J., was of opinion that where a Court by its order empowers an arbitrator to enlarge the time beyond three months which was fixed in the order the arbitrator

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11. (1911) I L R 38 C 522.
12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
13. (1914) 19 C W N 165.

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could not do so after the three months originally fixed for making the award had expired as he became *functus officio* and he has no further jurisdiction in the matter as the time had expired, and the award was set aside. This case was under the Civil Procedure Code of 1908 and Rules 3, 8 and 15 of the second schedule were considered. Chitty, J., observed:

"It is however clear that the arbitrator would only have such power as was conferred by the order and he would therefore be bound to enlarge the time before the time originally fixed for making the award had expired. If he did not do so, he was, by reason of efflux of time, *functus officio* and had no further jurisdiction in the matter. It is a matter of great regret that when this difficulty was first noticed, and there was a discussion with regard to it before the arbitrator, an application was not made then and there to the Court under Schedule II, paragraph 8 of the Code of Civil Procedure, in which case the Court could have enlarged the time, even though the time fixed for making the award had expired. This was not done presumably because the parties were willing to go on with the reference. I think that on the above ground the award is invalid and must be set aside."

It will thus appear that the distinction which Mr. Grant sought to draw between the old and the new Code has not been accepted by the learned Judges of the Calcutta High Court. In *Ramji Ram* v. *Salig Ram* (14) it was held that when an arbitrator had made, or made and published, his award as a completed instrument, his power is wholly at an end. Mookerjee, J., in an elaborate judgment has reviewed all the authorities, English and Indian. In *Sri Lal* v. *Arjun Das* (15) Chitty, J., doubted whether, having regard to the change in the law made by the wording of S. 148 and Sch. II, clauses 8 and 15 of the Code of 1908, the decision in *Shib Krishna* v. *Satish Chunder* (11) and the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) would be binding authorities. The learned Judge observed:

"The plaintiff relies upon the case of *Shib Krishna* v. *Satish Chunder* (11) in which Mr. Justice Harrington held that the Court had no power to extend the time for filing an award which had already been made before the application was presented. The learned Judge relied upon the case of *Har Narain Singh* v. *Bhagwant Kuar* (12) but that was a case decided under the Civil Procedure Code of 1882. Their Lordships of the Privy Council held that an award made out of time was invalid and that the arbitrators by such efflux of time were *functus officio*. In so doing they followed the express words of S. 521 which ran that 'no award shall be

11. (1911) I L R 38 C 522.
12 (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
14. (1911) 14 C L J 189. 15. (1914) 18 C W N 1325.

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valid unless made within the period allowed by the Court.' With all respect to the learned Judge who decided the case in *Shib Krishna* v. *Satish Chunder* (11) it appears to me that he did not give sufficient weight to the change which was made in the wording of S. 521 of the Code of Civil Procedure, 1882, in enacting paragraph 15 of the second schedule to the Code of Civil Procedure, 1908. As paragraph 15 runs, it appears to me to leave a discretion to the Court in deciding whether an award shall be set aside on the ground of its having been made after the expiration of the period allowed by the Court. I feel some doubt, therefore, whether the decision in *Shib Krishna* v. *Satish Chunder* (11) is correct in law. S. 148 of the present Code is in no way restricted, nor indeed is paragraph 8 of the second schedule. It might, therefore, be argued not without reason that they ought not to be restricted in the manner there held."

The learned Judge however went on to say that it was unnecessary to decide that point. In *Haridas* v. *Ootoomal* (16) it was held that the Court has power to extend the time for making the award under S. 12 of the Arbitration Act, even after the award is delivered, and the learned Judges distinguish *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) on the ground that that case proceeded on the wording of Ss. 514 and 521 of the Code of 1882. So far as S. 148 is concerned it is doubtful whether it would apply. That section gives power to the Court to enlarge the time where the Act is prescribed or allowed by the Code, and not where the time is fixed by any other enactment. But if S. 148 can be applied there is little reason for limiting it to cases where the award has not been delivered by the arbitrator.

Srinivasa Aiyangar, J., dissents from the decisions which empower the Court to enlarge time under S. 12 referred to by me and the main ground on which he thinks himself justified in doing so is that their Lordships of the Privy Council have in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) held that an arbitrator on the delivery of his award became *functus officio* and that the Court had no power to extend the time so as to validate the award. The learned Judge observes:-

"Indeed with regard to the terms of S. 13 it seems to me that the observations of their Lordships of the Judicial Committee in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) are very relevant because the similarity between the terms used in S. 13 of the Arbitration Act and S. 514 of the old Civil Procedure Code which their Lordships were considering is remarkable."

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11. (1911) I L R 38 C 522.
12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
16. (1912) 16 I C 861.

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In *Digambari Bewa* v. *Joy Narain Das* (17) the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) was referred to as authority for holding that an award made on a reference by the Court acting under the provisions of the Civil Procedure Code of 1908 was invalid and could not be validated by any extension of time if it was not submitted within the period required by the Court when it made the original order. There can be little doubt from the observations of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) that their Lordships proceeded on the view that after the expiry of the time limited by the Court for the submission of an award the arbitrator becomes *functus officio* and that the Court had no jurisdiction to extend the time so as to validate the award. There is, however, considerable force in the argument that the arbitrator is *functus officio* after the delivery of the award and if the decision in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) is good law in spite of the amendment in the Civil Procedure Code and the enactment of the Arbitration Act the Court will have no power to extend the time fixed when the award has been delivered.

The question raised is of considerable importance especially to the commercial community and as it is desirable that the matter in controversy should be settled by the decision of a Full Bench, I would refer the following point to a Full Bench:

> "Whether in cases where an award is remitted for the decision of the arbitrators or umpire without fixing any time for the return of the award the Court has power to extend the time fixed by S. 13 of the Arbitration Act after the arbitrators or umpire have, after the remission, given their award."

Curgenven, J.

Curgenven, J.—I agree with my Lord, whose order I have had the advantage of reading, that the preliminary objection, that no appeal lies, must be overruled. Applying the test proposed by Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (1) the learned Judge's order refusing to enlarge the time for the making of the award must be found to be in substance a final order, although it may be that either of the parties might still go through the empty formality of applying to have the award recorded. In the same way an appellant who has presented

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
17. (1912) 16 C L J 573.

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his appeal out of time, and who has failed to get the delay excused under S. 5 of the Limitation Act may still present his appeal and have it dismissed as time-barred. But it seems reasonable to hold, with the Bombay High Court in *Ramchandra Gangadhar* v. *Mahadev Moreshvar* (6) that the order which really had the effect of rejecting the appeal was that which refused to excuse the delay, and accordingly that it amounted to a "judgment" within the meaning of cl. 15 of the Letters Patent. The criterion laid down in *Tuljaram Row* v. *Alagappa Chettiar* (1) is one of substantial effect rather than of form.

Turning to the merits of the learned Judge's decision, the case appears to me to be eminently one in which an extension, if open to the Court to grant, should be granted. It was the umpire, and not the parties, who was responsible for the delay. The parties acquiesced in the making of the award out of time. There can be little doubt that, if an extension of time had been applied for before the expiry of the time already allowed, it would have been given. In these circumstances I can see no valid reason for refusing to extend the time if it be held that it is within the Court's competence to make such an order.

The learned Judge has disclaimed jurisdiction to make an order after the delivery of the award upon a consideration of the terms of Ss. 12 and 13 of the Indian Arbitration Act and because he holds that the judgment of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) is binding upon him. Taking the first ground, there appears to me to be no difficulty in holding, with Sanderson, C. J., in *Tejpal Jamunadas* v. *Nathmull & Co.* (10) that if under S. 12 time may be extended after the award has been made, it may equally be extended under S. 13. The occurrence in the former section only of the words "whether the time for making the award has expired or not" does not afford a safe guide to a conclusion, because they do not necessarily authorize an extension of time after delivery of the award. Under S. 13 the fresh award has to be made within three months "unless the Court otherwise directs." I do not think that it would entail placing an undue strain upon that phrase to hold that the Court's direction may be given not only after the expiry of the time already allowed but also, by way of retrospective validation, after the award has been passed. No reason has been suggested

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
6. (1917) I L R 42 B 260. 10. (1919) I L R 46 C 1059
12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).

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why the power of the Court in this respect should be more limited under S. 13 than under S. 12.

Assuming then that the power exists under both sections or under neither section, there is high authority for the position that under S. 9 of the English Arbitration Act, which is substantially identical with S. 12 of the Indian Act, the Court has jurisdiction to extend the time for making the award, although the award has in fact been made. If this were all, the way would, I think, be clear to hold accordingly under the Indian Act. But it is impossible to adopt that course without first deciding whether or not the judgment of the Judicial Committee in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) which was passed under the Civil Procedure Code of 1882 has application to awards governed by the Indian Arbitration Act. The judgment opens with the observation that the case has to be decided "entirely upon the construction of the Civil Procedure Code, Ss. 508, 514 and 521, and it does not appear that the construction of those sections can be very much aided by analogies drawn from sections of the English Common Law Procedure Act," under which time could be retrospectively extended. It is to be borne in mind that, before the enactment of that Act, the arbitraor, once his award was given, became *functus officio*: see *Mordue* v. *Palmer* (18), *In re Stringer and Riley Brothers* (19), *Sutherland & Co.* v. *Hannevig Brothers, Limited* (20) and neither he, nor I, conclude, the Court could make any order to bring the award within time. The Privy Council, in the case cited above, appear to hold that under the Civil Procedure Code of 1882 the same principle held good, for they say:

"When once the award was made and delivered the power of the Court under S. 514 was spent, and although the Court had the fullest power to enlarge the time under that section as long as the award was not completed, it no longer possessed any such power once that time was passed."

Whether or not that observation holds good under the present Code, I am inclined to think that it has no application to an award under the Arbitration Act, but the matter is not free from doubt, and I agree to the proposed reference.

[This O. S. appeal again came on for hearing in pursuance of the aforesaid Order of Reference to a Full Bench.]

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12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
18. (1870-71) 6 Ch. App. 22. 19. (1901) 1 Q B 105.
20. (1921) 1 K B 336.

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Martirosi v. Subramaniam Chettiar.

Kumaraswami Sastri, J.

Nugent Grant instructed by *Messrs. Short Bewes & Co., Attorneys,* for appellant.

P. Venkataramana Rao and *M. S. Ratnasabapathi Mudaliar* for respondent.

The Court made the following

OPINION :—*Kumaraswami Sastri, J*—I have in my order of reference dealt with the cases, both English and Indian, dealing with the question referred. Ss. 12 and 13 of the Indian Arbitration Act are taken almost *verbatim* from Ss. 9 and 10 of the English Arbitration Act. So far as the English Act is concerned, the authorities are clear that the Court has power to extend the time in the case of remitted awards even though the award has been delivered. I need only refer to *Lord* v. *Lee* (7) and to the decision of the Court of Appeal in *Knowles & Sons, Ltd.* v. *Bolton Corporation* (8).

Louis Dreyfus & Co. v. *Rajagopal Aiyar* (9) and *Tejpal Jamunadas* v. *Nathmull & Co.* (10) also follow the view taken by the English Courts. So far as the cases under the Civil Procedure Code are concerned, there has been a diversity of opinion. To the cases I have already referred to in the order of reference I might add *Gopalji Kallianji* v. *Chhaganlal Vitthalji* (21) where Sir Norman MacLeod, C. J., and Shah, J., were of opinion that the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) prevented Courts from extending the time after the delivery of the award even in cases under the Code of 1908. But this decision was not under the Arbitration Act, as a reference was made in a pending suit. I think there are not sufficient grounds for dissenting from the decisions I have already referred to, both English and Indian, which gave the Court power to extend the time even after the award has been delivered so as to cure any defect in the award owing to its having been delivered after the time fixed had elapsed. There seems to be no reason to limit the power under S. 13 of the Arbitration Act which admittedly gives power to extend the time beyond the period of three months before the award is delivered. I am unable to accept the extreme contention put forward by Mr. Venkataramana Rao that an extension beyond three months should be in the order remitting the award itself

7. (1868) L R 3 Q B 404. 8. (1900) L R 2 Q B 253.
9. (1922) 16 L W 657. 10. (1919) I L R 46 C 1059.
12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
21. (1920) I L R 45 B 1071.

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and that where three months have been fixed by the order the Court has no power to extend the time. Such a construction would lead to obvious injustice as it may be that after the order has been made fixing 3 months the arbitrators find that owing to a number of witnesses to be examined or other circumstances which prevent the finishing of the enquiry in 3 months further time is to be granted. There is, in my opinion, power to extend the time subsequent to the order which fixed three months as the period ; and if there is this power there is no reason why such time should not be extended after the award is delivered. If under S. 12 the Court can extend the time for the delivery of the award even though the time has expired it should have the power to extend the time when it remits an award unless there are very strong reasons to come to a contrary conclusion.

The Civil Procedure Code of 1908 deals with awards in the second schedule and Rule 14 deals with the remission of awards to arbitrators. Rule 15 says that an award remitted shall not be set aside except on the grounds mentioned in that rule and one of the grounds is that the award was made after the expiration of the period allowed by the Court. Rule 8 deals with extension of time for making award. It is argued by Mr. Venkataramana Rao that there is no difference between the Civil Procedure Code and the Indian Arbitration Act on the question of extension of time and that if the giving of the award after the expiry of time allowed by the Court entitles a party to have it set aside so far as arbitrations under the Code are concerned, the same rule should be applied to arbitrations out of Court. It is further argued that the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) though passed under the Code of 1882 is equally applicable to the present Code. S. 521 of the Code of 1882 with which their Lordships of the Privy Council were dealing enacts that no award shall be valid unless made within the period allowed by the Court. This clause is omitted in Rule 15 which I have already referred to and all that Rule 15 says is that the Court shall not set aside an award except on one of the grounds mentioned therein. I think this omission is not merely accidental and the question is how far under the new Code the omission of such a clause in Rule 15 of the second schedule which

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corresponds to S. 521 of the old Code without the last clause gives the Court discretion to extend the time even where the time for passing the award has expired. Chitty, J., in *Sri Lal* v. *Arjun Das* (15) was of opinion that the amendment introduced by the Code of 1908 gave the Court discretion even under the C. P. Code. I may point out that so far as the Arbitration Act is concerned, there is no section corresponding to the last clause of S. 521 preventing the Court from extending the time fixed in a remitted award. I think the proper way of construing Ss. 12 and 13 of the Arbitration Act is to read them together. Where an award is set aside under S. 13, either in whole or in part, and remitted to arbitrators, the effect of it is to re-open the proceedings under the Arbitration Act, the necessity for fixing three months or some time to deliver the award arising out of the fact that the time fixed in the original award might have expired before the remission or might have been considerably reduced. Once an award is set aside and remitted to arbitrators, I find it difficult to see why S. 12 should not apply to proceedings after remission as the matter then is really a matter in a pending arbitration without the original award having been set aside and why the provisions of S. 12 as to extension of time should not apply. The Court has, according to all the decisions I have referred to, both English and Indian, power to extend the time under S. 12 of the Indian Arbitration Act, which corresponds to S. 9 of the English Arbitration Act, even after the award has been delivered. There seems to me to be no reason why, when an award is remitted, a similar power should not exist unless there is something in the wording of the Act which compels me to come to a contrary conclusion.

I am of opinion that the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12), which was passed under the Civil Procedure Code of 1882 does not constrain us in dealing with Ss. 12 and 13 of the Arbitration Act to put a restriction on the power of the Court under S. 13 and to hold that although under S. 13 the Court might extend the time beyond three months if it did so in the order of remission, it has no power to do so once the award has been passed.

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12. (1891) L R 18 I A 55 · I L R 13 A 300 (P C).
15. (1914) 18 C W N 1325.

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I am of opinion that the decision of their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12), which was passed under the Civil Procedure Code of 1882 does not constrain us in dealing with Ss. 12 and 13 of the Arbitration Act to put a restriction on the power of the Court under S. 13 and to hold that although under S. 13 the Court might extend the time beyond three months if it did so in the order of remission, it has no power to do so once the award has been passed.

12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).
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I would answer the reference in the affirmative and hold that the Court has power to extend the time.

The Chief Justice :—I agree.

Reilly, J.—I agree. I may point out that a period of three months for making an original award, unless otherwise agreed, is fixed by Schedule I of the Arbitration Act. The effect of S. 13 (2) of the Act appears to me to be to fix a similar period, unless the Court otherwise directs, for an award to be made after remission ; it does not affect the power given to the Court by S. 12, which I understand to apply both to original awards and to awards made after remission. The Court can therefore extend the time for making an award on remission even after the time fixed either by S. 13 (2) or by the Court has expired. I agree that we need not apply the decision of the Privy Council in *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (12) which related to the provisions of the Code of Civil Procedure of 1882 to the present case. And under the present Code an award is not invalid merely because it is made after the time allowed. Here it is not the Code but the Arbitration Act which we have to interpret ; and I see nothing to prevent the Court from retrospectively extending under S. 12 of the Act the time fixed for making an award on remission so as to cover such an award already made after the expiry of the time previously fixed by S. 13 (2) or by the Court.

N. S. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

B. Raja Rajeswara Muthu Ramalinga Sethupathy Avergal through his authorised agent Dewan Raja M. Dinakar Bahadur ... *Petitioner* (Plaintiff)*

v.

Shunmuga Nadan and another ... *Respondents (Defts. 2 & 3).*

Raja Rajeswara Muthu Ramalinga Sethupathy v. Shunmuga Nadan.

Civil Procedure Code, O. 6, R. 14—Pleading—Signing of—Stamp bearing name of party—Use of—Sufficiency of—Party able to sign—Civil Procedure Code, S. 2 (20).

The use of a stamp bearing the name of the party is sufficient even in cases where he is able to sign. No distinction can in this respect be drawn between vakalats and affidavits and pleadings.

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*C. R. P. No. 1113 of 1925. 1st November, 1927.

12. (1891) L R 18 I A 55 : I L R 13 A 300 (P C).

Raja Rajeswara Muthu Ramalinga Sethupathy v. Shunmuga Nadan.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Paramakudi, dated 11th August, 1925, in E. A. No. of 1925 in S. C. S. No. 104 of 1922 on the file of the Court of the District Munsif of Manamadura.

S. Sundararaja Aiyangar for petitioner.

Respondents not represented.

The Court delivered the following

JUDGMENT :—Having regard to the definition of the word 'signed' in S. 2, clause 20 of the Civil Procedure Code, and to the fact that under R. 4 (11) of the Civil Rules of Practice, the same definition has to be applied in the case of affidavits and vakalats, we think that the use of a stamp bearing the name of the party is sufficient even in cases where he is able to sign. Even under the old Code of Civil Procedure of 1877 it was held in *The Maharaja of Benares* v. *Debi Dayal Noma* (1) that inability to sign was not necessary in order to enable a person to use a stamp. The definition of 'signed' in the present Code is to the effect that except in cases of judgments or decrees 'signed' includes stamped. There is nothing to show that any difference can be drawn between vakalats and affidavits and pleadings. We set aside the order of the District Munsif and direct him to receive and file the papers returned if they are otherwise in order.

A. S. V. *Order reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

Bhadri Narayana ... *Petitioner* in E. A. No.* 15 *of* 1925 *in I. P. No.* 3 *of* 1920 *on the file of the District Munsif's Court of Nandyal*

v.

Nagaldinne Srinivasa Rao and others ... *Respondents in do.*

Bhadri Narayana v. Srinivasa Rao.

Civil Procedure Code, O. 46, R. 1—Reference to High Court under—Validity—Decree subject to appeal—Reference in case of.

No reference can, under O. 46, R. 1 of Civil Procedure Code, be made in suits or appeals in which the decrees are subject to an appeal.

Case referred under O. 46 of the Civil Procedure Code by the District Munsif of Nandyal for the decision of the High Court

* Ref. Case No. 20 of 1925. 21st July, 1927.

1. (1881) I L R 3 A 575.

on the following questions in I. P. No. 3 of 1920 on the file of his Court, *viz.* :

(1) Whether the second petition under S. 35 is not maintainable in view of the dismissal of the first application under the same section when the amount found due was not questioned but is sought to be deposited.

(2) Whether the sales in favour of the petitioners in the connected petition by the receiver in insolvency are valid and require to be confirmed though they received back the money with interest and had not applied within 21 days thereafter.

(3) What is the effect of the order of this Court setting aside the sales held by the receiver in view of the appellate Court's order reversing the order of this Court annulling adjudication.

B. Somayya and *S. Ranganatha Aiyar* for petitioners.

The Court made the following

ORDER :—No reference lies in this case. The insolvency proceeding in which this reference has been made is subject to appeal under O. 46, R. 1 of the Civil Procedure Code. A reference can be made only in suits or appeals in which the decrees are not subject to an appeal. The reference being not according to law, the papers are returned.

A. S. V. *Papers returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Subramania Aiyar ... *Appellant* (Plaintiff)*

v.

V. Rama Aiyar and others ... *Respondents (Defendants and L. R. of the 2nd Defendant).*

Court-Fees Act, S. 7 (5)—Suit for possession of land—Items of land not separately assessed to revenue, but portions of survey numbers separately assessed—Court-fee payable—Proportionate part of five times the assessment—Notification No 4650—Fractional share—Meaning of—Area which can be worked out as a fraction—Trees standing on land—Separate valuation if necessary—Liberal construction of the Act—Civil Procedure Code, O VII, R 11—Rejection of plaint—When can be supported

Where the plaint schedule mentions a number of items which are not separately assessed to revenue but which are portions of survey numbers which have been separately assessed, Court-fee need not be paid on the market value but need be paid only on the proportionate part of five times the assessment of the whole survey number.

*Appeal No. 348 of 1923. 10th August, 1927.

Subramania Aiyar v. Rama Aiyar.

The words "fractional share" in the Notification No. 4650, dated 10th September, 1921, are not inapplicable to a case where the plaintiff claims a certain definite extent as 3 acres 30 cents out of a larger extent as 7 acres 30 cents, as the share he claims is a fraction of a larger area. The fact that the plaintiff mentions this area which can be worked out as a fraction of the whole but does not mention it by describing it as a fraction does not make any difference.

Reference under the Court-Fees Act, 1870, *S.* 5, (1894) I. L. R. 16 All. 493 and *Ghandhan* v. *Bishan Singh*, (1911) I. L. R. 33 All. 630 disapproved.

Godavarty Sundaramma v. *Godavarty Mangamma*, (1916) 34 M. L. J. 558 and *Kandasami Goundan* v. *Subbai Goundan*, (1923) 46 M. L. J. 345 referred to.

In a suit for recovery of possession of land on which trees stand, it is not necessary to value the trees separately for the purpose of paying court-fees but it is enough if the land is valued according to the Court-Fees Act.

Kullappa Goundan v. *Abdul Rahim*, (1916) I L R 40 M. 824 referred to.

The Court-Fees Act is a fiscal enactment and ought to be liberally construed.

A suit was filed on the last day allowed by the law of limitation. It was returned by the office with four requisitions, the fourth being that the valuation had not been given in respect of all the properties described in the plaint schedule. The plaintiff's pleader re-present the plaint satisfying the first three requisitions and with a note that "those mentioned in the lots had been amended". The office was satisfied with the re-presentation and the plaint was numbered and notices issued to the defendants. In the written statement a plea was taken that the court-fee paid was not correct as court-fee ought to have been paid on the market value. An issue was framed as to whether proper court-fee had been paid on the plaint. Before the suit came on for trial the defendant put in a petition under O. VII, R. 11, Civil Procedure Code, raising various objections to the valuation and payment of court-fee made by the plaintiff. This petition was adjourned to various dates and finally the plaintiff filed a petition for amendment of the plaint. Both the petitions were heard together, and the amendment was refused and the planit rejected.

Held, (on appeal) that the order of rejection of the plaint cannot be sustained under O. VII, R. 11 of the Civil Procedure Code.

Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in O. S. No. 40 of 1921 (O. S. No. 81 of 1920 of Mayavaram Sub-Court).

A. Krishnaswami Aiyar and *B. C. Seshachella Aiyar* for appellant.

K. Bhashyam Aiyangar and *V. C. Viraraghavachariar* for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J. :—This is an appeal against the order of the Additional Subordinate Judge of East Tanjore at Mayavaram dismissing O. S. No. 40 of 1921 on the ground that the pro-

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per court-fee has not been paid. The order rejecting the plaint could have been passed only under O. 7, R. 11, Civil Procedure Code. The suit was brought by the plaintiff claiming to be the reversioner, under the Hindu Law, of one Ramaswami Aiyar and he claimed the property after the death of his widow and his daughters. The plaintiff is his daughter's son. The suit was filed on the last day allowed by the law of limitation. To some extent this fact seems to have prejudiced the Subordinate Judge against the plaintiff. While we have no particular sympathy with a stale suit, I do not see any reason why one should be prejudiced against the plaintiff on that ground. The plaint was presented on 28th August, 1920. It was returned by the office with four requisitions. The fourth is "valuation has not been given in respect of all the properties described in the plaint schedules." This was on the 30th August. The plaintiff's pleader re-presented the plaint on 7th September with the note "Those mentioned in the lots have been amended. Re-presented after amendment." It is now admitted that the first three requisitions have been satisfied, but it is urged for the respondents that the fourth was not. I will discuss this point later on. The office was, however, satisfied with the re-presentation and a note was made "Stamp correct; plaint may be filed." The plaint was then numbered and notices were issued to the defendants. In the written statement a plea was taken that "the court-fee paid is not correct. The court-fee should have been paid in respect of the suit properties on their market value." An issue was framed, "Has proper court-fee been paid on the plaint?" and the suit was adjourned. Before it came on for trial on 30th March, 1922 there was a petition by the defendants under O. 7, R. 11, raising various objections to the valuation and the payment of court-fee made by the plaintiff, and a counter-petition was filed; and the petition was posted to 26th April. On that day the plaintiff wanted a commission. So the case was adjourned to 20th July. On 20th July the plaintiff said that he did not want the commission and that he would adduce evidence. The matter was adjourned to 10th August. On that day some arguments were heard. The same day the plaintiff filed a petition for amendment. The amendment was refused and the plaint was rejected on 21st August.

Under O. 7, R. 11, a plaint cannot be rejected unless the plaintiff is given an opportunity to correct the valuation within a time fixed by the Court where the relief is under-valued, or

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the plaintiff is given an opportunity to supply the requisite stamp paper within the time fixed by the Court where the plaint is filed on an insufficient stamp. It is contended by Mr. Bhashyam Aiyangar, vakil for the respondents, that clause (*b*) applies and that an opportunity was given to the plaintiff to correct his valuation but he did not avail himself of the opportunity. In support of this contention he relies on the fourth requisition when the plaint was originally returned. The requisition itself does not show in respect of what property valuation was not given. No details were mentioned in it. The respondents' vakil no doubt filed a list of details in the petition of 1922. This is list D, but there is nothing to show that these were the matters intended by the Court when the plaint was returned on 30th August, 1920. It is likely that they were not, because the plaint was accepted on re-presentation. It may be that, when there is a clear omission in the original plaint, and the Court demanded the plaintiff to rectify the defect and returned the plaint, and the plaintiff re-presented the plaint without rectifying it, the mere fact that the Court accepted the plaint overlooking the plaintiff's failure to rectify does not estop the Court from rejecting the plaint some time afterwards, though even then, such action on the part of the Court is undesirable. In the present case it cannot be said that there was any clear requisition by the Court. It was too general. Taking the matters in detail, in list D, the first objection is that certain items were omitted. The plaintiff accepted this objection and paid court-fee in respect of these three items, and he applied by I. A. No. 285 for permission to amend the plaint by adding these three items. But this is not an omission to value the items. The items themselves were omitted by a slip, and seeing that the suit was of some magnitude, for the plaintiff had admittedly paid court-fee on Rs. 10,000, such an amendment ought to be allowed. At any rate the matter does not come under O. 7.

The next objection is that some trees ought also to be separately valued. In so far as the trees standing on specific items claimed in the plaint are concerned, it is not necessary to value them separately. [Vide *Kullappa Goundan* v. *Abdul Rahim* (1).] They are included in the valuation of the items themselves. It was made according to the Court-Fees Act, namely, five times the assessment on the items. But it is said that

1. (1916) I L R 40 M. 824.

there are some trees on poramboke lands. The plaintiff has made it clear that in respect of all porambokes, such as channel, burial grounds, etc., the only rights he seeks are rights accessory to ownership of plots in the village and not rights of actual ownership as in the case of specific cultivated plots. That being so, these trees need not be valued.

Then, the defendant also mentioned one item in his list, namely, "proportionate share in patta No. 30 in respect of chethi and common samudayam shares of Seruvalur". To this also the plaintiff says that he does not claim any specific proprietary rights in the chethi and samudayam but merely claims accessory rights. The defendant says that there is a specific plot which is enjoyed in common by all the sharers in the village. The matter in dispute depends on evidence and further enquiry. If on enquiry the defendant's version turns out to be true the plaintiff's suit as to this item may have to be dismissed. But without ascertaining what exactly are the facts existing in the village, one cannot attribute default to the plaintiff and reject the suit. The matter can only be noted at present and can be disposed of when the whole suit is tried. It is obvious that matters of this kind, namely, the right to patta No. 30, could not have been known to the Court when it made the requisitions in August, 1920 and could not have been meant by it in the fourth requisition. I am, therefore, of opinion that what happened in August, 1920 could not be regarded as any opportunity to the plaintiff, when the real specific objections to the plaint were disclosed in 1922 by the petition of the defendant. The Court after expressing its opinion on such a petition and the counter-petition ought to have given an opportunity to the plaintiff to correct the valuation or pay the additional stamp duty, as the case may be. This it has not done. On the simple ground that the dismissal of the suit is erroneous, assuming on the merits that there is some default on the part of the plaintiff in the matter of paying court-fees, the order of the Court below cannot be sustained. I now go to the merits to see whether there is any default on the part of the plaintiff and if so, what, and whether an opportunity should be given to the plaintiff, and we have to point out the proper amount of court-fee and fix a time for paying it.

List A filed by the defendant shows some mistakes in the plaint in giving the revenue assessment of various items. It is now admitted that these mistakes have been corrected by the

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plaintiff and the additional court-fee has been paid by the plaintiff. So we have nothing to do with this list.

List B gives a number of items which are not separately assessed to revenue. These are all portions of survey numbers which have been separately assessed. In respect of this the defendant's contention is that the plaintiff should pay court-fee on the market value and not on the proportionate part of five times the assessment of the whole survey number. The plaintiff relies on Notification No. 4650, dated 10th September, 1889, issued by the Government of India. It has now been superseded and re-enacted by Notification No. 358, dated 10th September, 1921. Under this Notification, "when a part of an estate paying annual revenue to the Government under a settlement which is not permanent is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of . . . a fractional share of that part shall, for the purposes of the computation of the amount of the fee chargeable in the suit be deemed not to exceed five times such portion of the revenue . . . " This notification was the subject of consideration in *Reference under the Court-Fees Act,* 1870, *S.* 5 (2) which was a decision of a single Judge. It was there held that a fractional share under this notification covers only a case where the plaintiff claims a certain fraction of a survey number but not where he claims a certain definite area within the survey number; for instance, if the plaintiff claims 1|2 or 1|3 or 1|4 share of a survey number assessed with revenue the notification applies, but where he claims 3 acres 70 cents out of a survey number whose extent is 7 acres 30 cents the notification does not apply, though 3 acres 70 cents is 37|73 of 7 acres 30 cents. The point came up for discussion in *Godavarty Sundaramma* v. *Godavarty Mangamma* (3) which was considered by a single Judge, namely, Coutts Trotter, J., as he then was. No reference was made to this notification, but the decision in *Reference under the Court-Fees Act,* 1870, *S.* 5 (2) was referred to, and one perhaps may infer that by reference to the decision in *Reference under the Court-Fees Act,* 1870, *S.* 5 (2) the learned Judge was also aware of the notification. He agreed with Burkitt, J., but he regretted his conclusion and said that the result was very anomalous. He pointed out that a suit for a share would have to go before a higher Court, whereas a suit for the whole survey number may go before a lower

2. (1894) I L R 16 A 493. 3. (1916) 34 M L J 558.

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court. He was of opinion that a "fractional share" cannot cover a case where the plaintiff claims a definite extent out of a larger survey number separately assessed. There was a Letters Patent Appeal against his judgment. But before the Division Bench all that seems to have been done was that a report was called for from the District Munsif on the the question whether the portion was separately assessed, and, when it was found not separately assessed, the appeal was dismissed. The question of the interpretation of the notification was apparently not argued, at any rate there is nothing in the judgment about it. The judgment of the Division Bench cannot be regarded as an authority for the interpretation of the notification. The point next came before Krishnan, J., in *Kandaswami Goundan* v. *Subbai Goundan* (4). He followed the earlier views. He also referred to two unreported decisions in Madras. The first is S. A. No. 886 of 1917. Sadasiva Aiyar and Napier, JJ., passed this order, "Following Letters Patent Appeal No. 97 of 1916 we hold that the plaintiff was bound to pay court-fees on the market value of the plaint land." Here again, it does not appear that the notification was cited before the learned Judges or that they considered it. The other unreported decision referred to by Krishnan, J., is S. A. No. 711 of 1915. There, Oldfield, J., made a passing reference to *Reference under the Court-Fees Act* 1870, S. 5 (2) and *Godavarty Sundaramma* v. *Godavarty Mangamma* (3). The argument was that the lower appellate court's jurisdiction would have been ousted if the items were valued in a particular way. But the other side contended that even if they were valued according to *Reference under the Court-Fees Act*, 1870, *S.* 5 (2), there would have been no change in the Court's jurisdiction. The contention was disallowed. There is no decision on the point. I do not think that S. A. No. 711 is of any value as a decision on the question now under consideration. The view in *Reference under the Court-Fees Act*, 1870, *S.* 5(2) was followed in *Chandhan* v. *Bishan Singh* (5) by Tudball, J. Even the judgment of Krishnan, J., does not show that he considered the notification. He said that the construction of S. 7, clause 5 (*a*) to (*d*) has been the subject of consideration both in this Court and the Allahabad High Court. If so, and if Krishnan, J., has only considered the Court-Fees Act, and not the notification, his decision is of no value either. The notification is one

2. (1894) I L.R 16 A 493
3. (1916) M L J 558.
4. (1923) 46 M L J 345
5. (1911) I L R 33 A 630.

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purporting to remit the court-fees and it was intended to give some relief to the subjects against the anomalous fees leviable under the Act itself. In so far as all these decisions lay down that under the Act itself a plaintiff suing for the possession of a part of a survey number should pay court-fees on the market value, I agree with them. But the object of the notification is to give relief from the anomalous position, and, where the notification has not been considered, the decisions are of no value. It is noticeable that the Act uses the words "definite share" and while making provision for a definite share or a part of an estate it did not make any provision for a part of separately assessed survey number. The notification did not use the words "definite share" but used the words "fractional shares". I do not understand any of the Judges who have considered the matter to say that a fraction means a simple fraction like 1|2, 1|3 or 1|4 and not a complicated fraction like 19|48 or 37|72, etc., as one may get in Muhammadan Law cases. If the words "fractional share" can cover any kind of fraction, the only question is, does it make any difference when a plaintiff mentions an area which can be worked out as a fraction of the whole but does not mention it by describing it as a fraction? In my opinion it does not. The opposite conclusion can be easily evaded by a clever plaintiff describing the plot he claims not as so many acres and cents but as the north-western 37|73 of such and such a survey number or something like that. I do not think that liability to pay court-fee should depend upon the ability to evade or not. The Court-Fees Act is a fiscal enactment and ought to be liberally construed. The anomaly is recognised by Coutts Trotter, J. If by a fairly reasonable construction one can avoid the anomaly, I think one ought to do so. Of course, if it is impossible to escape the anomaly and the language of the notification can by no manner of construction be made to support the plaintiff's contention, then one cannot help it. But it seems to me that the words "fractional share" are not inapplicable to a case where the plaintiff claims 3 acres 30 cents out of 7 acres 30 cents, as the share he claims is a fraction of a larger area. All that can be said against the plaintiff is that what he claims is a fraction with defined boundaries but the words "fractional share" cover both a definite fraction and also an indefinite fraction. Whereas the learned Judges who considered the matter seem to limit the words to the case of indefinite fraction. They think that the notification applies to unspecified 1|2 or 1|4 but not to a definite 1|2 or 1|4. I do not

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see any reason why the words "fractional share" should be so limited. At any rate, I am not doing any violence to the English language when I say that the words cover both definite and indefinite fractional shares. Tudball, J., seems to think that a specific share is not covered by "fractional share" and there is some difference between a specific share and a definite share. The result is I am unable to agree with Burkitt, J., and Tudball, J., in the Allahabad cases.

As to the Madras cases I am of opinion that no Division Bench ever considered this matter, and it is clear that even Coutts Trotter, J., did not consider the notification. If he really considered it, then, with great deference, I am not able to agree with him. It seems to me that the conclusion I am arriving at is a reasonable construction avoiding all anomalies and does not do any violence to the language of the notification. It is noticeable that the notification deliberately omits the words "definite share" and uses the words "fractional share," and I am therefore of opinion that the plaintiff need not pay court-fees on the market value of the property in List B.

The next point to be considered is List C filed by the defendants. It is said that some of the items are undervalued —plots in A-1 and A-2 schedules. The defendant has filed an affidavit and given his valuation which the plaintiff says is too much. The plaintiff is prepared to adduce evidence. The B Diary is not very clear as to whether the learned vakil for the plaintiff was ready with the evidence. It does not show that the case was ever posted for such evidence. We think that the plaintiff is entitled to an opportunity for adducing evidence as to the value of the items. If, after taking the evidence on both sides, the Lower Court comes to a conclusion against the plaintiff, then liberty must be given to the plaintiff to file additional court-fees. Of course it is open to the plaintiff to expunge these items from the plaint if he likes. It is also open to the defendant to waive his objections for the purpose of accelerating the trial of the case, but we do not see any reason for dismissing the suit as the Subordinate Judge has done. The result is the judgment of the Subordinate Judge is reversed and the suit is remanded to the Court below for disposal according to law.

In the case of A schedule properties the plaintiff's claim is for the Ekabhogam miras village. I have already pointed out that the plaintiff has paid court-fee on the assessed lands

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and in respect of porambokes he claims only accessory rights and therefore need not pay any court-fee in respect of them.

The respondents will pay the costs of the plaintiff in this Court, namely, all costs except the court-fee for appeal charges.

The court-fee paid by the appellant will be refunded.

The case will be sent back to the Sub-Court of Tiruvalur, the Sub-Court of East Tanjore at Mayavaram having ceased to exist.

N. S. *Appeal allowed and suit remanded to Lower Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

Archaka Sundara Raju Dikshatulu ... *Appellant** *(Plaintiff)*

v.

Archaka Seshadri Dikshatulu and others ... *Respondents (Defendants).*

Sundara Raju Dikshatulu v. Seshadri Dikshatulu.

Deed—Construction—Mortgage—Lease—Test—Khanda Bhogiam deed—Service inam lands—Lease of, by holder of office—Void or voidable by successor—Tests—Premium paid—Lease in consideration of—Office to which lands attached hereditary—Effect—Custom authorising alienation of service inam lands—Validity.

The question was whether a Khanda Bhogiam deed executed in respect of hereditary archaka service inam lands was a mortgage or a lease.

By the said deed the mortgagee or lessee was put in possession of the lands covered by it for a term of 30 years in consideration of a sum of Rs. 8,225 advanced to the executant of the deed. The premium so taken was to be worked off by the enjoyment of the produce for 30 years, and a portion of the produce was to be given to the executant of the deed. There was no liability to account for the rents and profits, nor was there any question of redemption on payment of money. All that the document required was that an account should be kept as regards the payment of the kist and of the various expenses.

Held, that the document was a lease and not a mortgage.

Held further, having regard to the terms of the said document, that the lease was not absolutely void but that it was only voidable at the option of the successor of the grantor of the lease.

Held also that, as the plaintiff, the successor in office of the grantor of the lease, not only did not repudiate it when he assumed office, but adopted it after attaining majority by receiving rent and filing a suit to recover the rent reserved, he was bound by the lease.

In deciding whether a lease of service inam lands is valid, the real question to be considered is whether the transaction in effect places the income from the lands beyond the disposal of the holder of the office and prevents him from enjoying the emoluments which were intended to go

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*Appeal No. 176 of 1923. 8th February, 1927.

to the holder of the office in order to enable him to discharge his duties properly.

Permanent leases or leases for so long a period as would practically amount to an alienation will be invalid as against the successor in office. Where the lease in question is not of this character, it is not absolutely void but is only voidable at the instance of the successor in office. Where a premium is taken, one test of the validity of the lease will be whether the rent paid is sufficient to maintain the holder of the office in such a way as not to interfere with the due performance of the duties attached to the office. The fact that the office to which the lands are attached as emoluments is hereditary makes no difference as regards the validity of a lease thereof.

Semble :—A custom authorising the alienation of service inam lands is invalid.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor, dated 30th September, 1922, in O. S. No.20 of 1920.

C. V. Ananthakrishna Aiyar (Government Pleader) and *T. K. Srinivasa Thathachariar* for appellant.

T. V. Muthukrishna Aiyar for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENT :—*Kumaraswami Sastri, J.* :—Plaintiff is the appellant. He filed a suit for a declaration that the Khanda Bhogiam deed executed by his adoptive father in respect of the lands mentioned in the plaint which are archaka service inam is invalid and for possession of the properties. His case was that the lands are archaka service inam lands granted to his ancestors for the purpose of doing service in Tirumalai Tirupathi Devasthanam, that, on the death of his adoptive father, the plaintiff succeeded to the hereditary office, that as archaka of the temple he is entitled to hold the lands free from any encumbrance, and that his adoptive father purporting to act for himself and as guardian of the plaintiff executed the Khanda Bhogiam deed, dated the 21st of February, 1913, whereby the 1st defendant was put in possession of the properties for a term of 30 years in consideration of a sum of Rs. 8,225 alleged to have been paid to the father. The plaintiff also states that there was no consideration for the deed, that the debts are not true and binding on him, that the deed is further invalid as having been taken from the plaintiff's father who was an old and orthodox person of weak mind, ignorant of worldly affairs and completely under the influence of the 1st defendant, that the property being service inam is not alienable and that the document even if supported by consideration will not be valid beyond the lifetime of the holder of

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the office. The defence was that the alienation was valid and supported by consideration, that the lands comprised in the deed are alienable and that the lease deed is valid and binding. It is also alleged that the plaintiff with full knowledge ratified the lease after the death of his father and that he is estopped from disputing its validity. The Subordinate Judge dismissed the plaintiff's suit. He held that the consideration mentioned in the document was paid, that there was no undue influence or fraud in the matter, that, though the lands are inam lands, there was a custom of alienability, and that even apart from any such custom the lease of the lands is valid and binding and it is not an alienation prohibited by law. The plaintiff appeals.

It is not disputed that the lands in question are lands granted as inam to the person who holds the office of archaka. It is clear from Ex. B, extract from the Inam Register, Exs. C and D as well as Ex. A that service was to be rendered. Exs. C and D, which are as far back as 1822, prohibit alienation even by lease but it is doubtful whether these orders would in law render leases invalid in the absence of anything in the grant and as a matter of fact it is not disputed that there have been several dealings with this property by way of Ijar or lease. Ex. I is the Khanda Bhogiam deed which is impeached. It is dated the 21st February, 1913. Its genuineness is not disputed. It recites that the amount due by the plaintiff's father was Rs. 8,225 and that he was unable to pay the amount and has no other income except the income got from the village described in the schedule, possession was delivered of the Inam village for a period of 30 years from fasli 1323 to fasli 1353. This document refers to a previous document of the 12th of April, 1910. As regards the enjoyment and payment of rent the deed runs as follows :

"Therefore you shall enjoy the said village from this time forwards and you yourself shall discharge the above-mentioned debts. From this time forwards you yourself shall collect all the income that has been collected by us in the said village. We have nothing to do with the profit and loss occurring in the same. You shall have all the rights held by us in the said village for this Khanda Bhogiam period of 30 years for collecting arrears from the ryots in the said village. You shall pay the kists payable to the Sircar (Government) on the said village and obtain receipts. You should give the receipts to us after the Khanda Bhogiam period, that is when the said village was delivered possession to us. If you fail to pay the said kists according to instal-

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ments you should pay the loss sustained by us thereby. For the said period of 30 years you shall pay to us at the rate of Rs. 120 (one hundred and twenty rupees) in cash and 24 (twenty-four) putties of paddy either Pattadu Sambavu or Garika Sannam worth about Rs. 144 every year and should be given in two instalments on the 30th of Karthika month for Karu and on the 30th of Chitrai, Vaisaka produce in every year. If you fail to pay in the said manner you should pay the same to us on demand with interest thereon at the rate of one per cent. per mensem from the date of default."

It then goes on providing for the supply of straw, etc. It says that accounts should be maintained according to those maintained by the lessor which should be delivered after the Khanda Bhogiam period is over and that the repairs should be executed to the channels by the lessee.

The first question is whether this document is a lease or mortgage. Having regard to the terms of the document, I think it is a lease. It satisfies all the requirements of a lease as defined in the Transfer of Property Act. A premium is taken, which premium is to be worked off by the enjoyment of the produce for 30 years and a portion of the produce is to be given to the executants of the document. It is sometimes difficult to draw the line between a mortgage with possession and a lease where a premium is recovered by the lessor, but considering the documents as a whole I think it is a lease.

In *Nidha Sah* v. *Murli Dhar* (1) there was a document which was said to be a mortgage with possession for a period of 14 years under which it was provided that on the expiration of the term the mortgagor shall come into possession of the mortgaged properties without settlement of accounts and that on the expiration of the term the mortgagee shall have no power whatever in respect of the estate which after the expiration of the term of the mortgage deed shall be returned to the mortgagor without his paying the mortgage money secured under the document. It was held by their Lordships of the Privy Council that it was merely a lease. Sir John Bonser who delivered the judgment of their Lordships observed:

"This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption, express or implied. It was simply a grant of land for a fixed

1. (1902) L R 30 I A 54 : I L R 25 All 115 (P C).

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term free of rent in consideration of a sum made up of past and present advances."

These remarks apply to the present case. There is no liability to account for the rents and profits, nor is there any question of redemption on payment of any money. All that the document requires is that an account should be kept as regards the payment of the kist and of the various expenses.

So far as consideration is concerned, there can be no doubt that the consideration as set out in the document was due and payable and as regards the plea of undue influence it has not been made out. It is not seriously disputed and argued before us in appeal that the document is invalid for any other reason but the inalienability of the land purported to be dealt with by the document Ex. I, as it was land granted for temple service. The only question therefore is whether that deed which is in my opinion a lease is invalid.

It has now been settled by this Court that alienation of temple service lands by sale, gift or mortgage, are invalid. I need only refer to the decision of the Full Bench in *Anjaneyulu v. Sri Venugopala Rice Mill, Ltd.* (2), where it was held that lands held on Swasthivachaka service tenure are not subject to attachment in execution of a decree and that the sale of such lands is opposed to public policy. All the earlier decisions are referred to and discussed.

In *Venkata Rao* v. *Bapayya* (3) it was held by Devadoss and Wallace, JJ., that the alienation of Swasthivachakam inam lands is invalid and that the fact that the alienation was in favour of a member of the family does not validate the transfer.

It is argued by Mr. Muthukrishna Aiyar for the respondents that these decisions only apply to sales, gifts or mortgages and not leases, and that consequently a lease could be made. In dealing with this question we have to see the nature of the transaction rather than the form. A lease for 99 years or for a long term in consideration of a premium paid down is as much an alienation as a sale or mortgage and I do not think that the mere use of the word 'lease' or the fact that a long term is fixed would, having regard to the mischief which is sought to be guarded against by holding that service inam lands are not alienable, make the lease valid. The real question is whether the transaction in effect places the income from the lands beyond the disposal of the holder of the office and prevents

2. (1922) I L R 45 M 620 : 42 M L J 477 (F B).
3. (1926) 24 L W 674.

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him from enjoying the emoluments which were intended to go to the holder of the office in order to enable him to discharge his duties properly.

In *Rama Varma Tambaran* v. *Raman Nayar* (4) there was a kanom for 96 years and Innes and Muttuswami Aiyar, JJ., held that the kanom was invalid. The learned Judges observed :

"There seems to be no real distinction between the mischief of such a transfer in perpetuity and a transfer for the long period of 96 years."

In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (5) their Lordships of the Privy Council observed that there was no difference in principle between the grant of a lease in perpetuity of *debottar* lands at a fixed rent and an absolute alienation in perpetuity of the same kind of land in consideration of a premium and set aside a permanent lease at a fixed rent on payment of a premium of temple lands.

In *Rama Reddi* v. *Ranga Dasan* (6) Devadoss, J., observed :

"A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale."

In *Madhavrao Waman* v. *Raghunath Venkatesh* (7) their Lordships of the Privy Council were of opinion that the grant of a permanent lease of service watan lands would undoubtedly be an alienation within the Bombay Regulation which prohibited watandars without the sanction of the Government to sell, mortgage or otherwise alienate or assign any watan.

It is thus clear that permanent leases or leases for so long a period as would practically amount to an alienation will be invalid as against the successor in office who will be entitled to the rents and other emoluments arising out of the land which goes with the office.

When the lease in question is not of this character, I think that it is not absolutely void but only voidable at the instance of the successor in office. It cannot be said that the holder of the office is bound to cultivate the lands personally and very often leasing the land is the usual or beneficial mode of enjoy-

4. (1882) I L R 5 M 89.
5. (1917) I L R 40 M 709 : 33 M L J 1 (P C).
6. (1925) 50 M L J 589. 7. (1923) I L R 47 B 798 : 47 M L J 248 (P C)

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ment, nor will it be possible to fix any hard and fast rule in considering such leases. Where a premium is taken one test will be whether the rent paid is sufficient to maintain the holder of that office in such a way as not to interfere with the due performance of the duties attached to the office.

Having regard to the terms of the lease deed in question I think it is not absolutely void but that it is only voidable at the option of the plaintiff. The holder of the lands attached to an office has by the very nature of his tenure no power to lease the property so as to enure beyond his life-time and the fact that the office is hereditary makes no difference.

The lease in my opinion being voidable, the next question is, whether the plaintiff on succeeding to the office elected to avoid it. On this point there can be little doubt that the plaintiff, after he attained majority, not only received rent but also filed a suit to recover the rent reserved. I agree with the Subordinate Judge in thinking that the plaintiff is bound by the lease as he did not repudiate it when he assumed office.

As regards the custom of alienation which the Sub-Judge thinks is made out it is difficult to see how there can be a custom which is opposed to the law or how illegal alienations, if repeated, can convert inalienable into alienable property. There is in this case no question of any *bona fide* purchaser or mortgagee. Nor are we concerned with the right of the trustees of the temple.

The appeal fails and is dismissed, but under the circumstances without costs.

Devadoss, J.—I agree and I have nothing to add.

A. S. V. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

P. C. Muthu Chettiar ... *Appellant** (*Plaintiff*)

v.

K. V. Meenakshisundaram Aiyar and others ... *Respondents* (*Defendants*).

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Muthu Chettiar v. Meenakshisundaram Aiyar.

Construction of written documents—They must be read as a whole—Compound interest—Interpretation of words "interest on interest" in mortgage-deed.

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* P. C. Appeal No. 75 of 1925. 29th November, 1927.

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It is one of the cardinal principles of construction of written documents that they must be construed as a whole; each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be ascertained. Observations of Lord Ellenborough in *Barton* v. *Fitzgerald*, (1812) 15 East 530 and in *Sicklemore* v. *Thistleton*, (1817) 6 M & S. 9 at 11 and of Lord Halsbury in *Elderslie Steamship Company, Ltd* v. *Borthwick*, (1905) A. C. 93 relied on.

The phrase "he shall pay *interest on interest*" occurring in a mortgage-deed is ambiguous, and does not necessarily connote a liability to pay compound interest. Reading the document as a whole, these words fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest. To hold otherwise would lead to results, which clash with the plain and clear objects and meaning of the natural and unambiguous provisions of the document.

Appeal No. 75 of 1925 from a judgment and decree of the High Court, Madras (Ramesam and Jackson, JJ.), dated the 18th January, 1924, allowing an appeal from the judgment of the Subordinate Judge of Dindigul, dated the 30th October, 1920, and made in O. S. No. 77 of 1919.

The said suit was brought by the assignee of a mortgage dated the 28th January, 1911, for a mortgage decree for Rs. 21,532-8-6. During the pendency of the suit the defendants paid into Court Rs. 12,500. The Subordinate Judge made a decree for a further sum of Rs. 12,301-9-6, but on appeal the High Court held that by the said payment into Court the mortgage was discharged, and made a decree accordingly dismissing the suit.

Against the last-mentioned decree the plaintiff preferred this appeal to His Majesty in Council, and the question thereon was as to the rate of interest due under the mortgage. The plaintiff-appellant's contention thereon was that compound interest on the mortgage amount was chargeable at 12 per cent. with monthly rests from June, 1912. The High Court negatived this contention as being inconsistent with the terms of the mortgage as duly construed. In their judgment the learned Judges say:

"The only point for consideration in this appeal is the construction of Exhibit 'A', the deed of mortgage sued upon,"

and they express their conclusion as follows:

"We think the proper construction of the clause is when each amount of monthly interest became overdue, it should carry interest at 12 per cent. up to payment, there being no further rests. It is conceded by the parties that the amount tendered, viz., Rs. 12,500, was enough to cover the sum

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due up to the date of tender and the plaintiff is not entitled to any further sum."

De Gruyther, K. C. and *Narasimham* for appellant.

K. Brown for respondents.

De Gruyther, K. C. :—It is a question of construction. We are entitled to charge interest on interest. Whether you call it compound interest, or interest on interest, we are entitled to the interest we claimed.

[*Lord Sinha* :—I doubt if in the case of an English deed you could charge interest with monthly rests unless it was so provided for in the deed itself.]

Reference was made to S. 83, Transfer of Property Act and Tamil dictionaries as to the meaning of the vernacular words in dispute.

Counsel for Respondents was not called upon.

29th November, 1927. Their Lordships' judgment was delivered by

Lord Atkinson

LORD ATKINSON.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th January, 1924, allowing an appeal from the judgment of the Subordinate Judge of Dindigul, dated the 30th October, 1920. The suit was brought by the assignee of a mortgage dated the 28th January, 1911, for a mortgage decree for Rs. 21,532-8-6. During the pendency of the suit the defendants paid into Court Rs. 12,500. The Subordinate Judge made a decree for a further sum of Rs. 12,301-9-6, but on appeal the High Court held that by the payment into Court the mortgage was discharged, and made a decree accordingly dismissing the suit. Against the last-mentioned decree the plaintiff (hereinafter referred to as the appellant) has preferred this appeal, and the question in it is the rate of interest due under the mortgage.

It is essential to examine closely the provisions of the two instruments upon which the appellant's title to relief purports to be based. The first of these is a hypothecation bond, dated the 28th January, 1911, by which Subramania Aiyar (the father of the respondents) purchased a house therein described for the sum of Rs. 20,000 from one Padmanabha Naidu, of which sum it was by the said bond provided that the sum of Rs. 10,000 should remain outstanding on mortgage of the properties so purchased. On the 27th July, 1912, the purchaser, Padmanabha Naidu, by written instrument, assigned his aforesaid mortgage to the present appellant. It is stated in this instrument and apparently not disputed that the mortgagor

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had, on the 9th April, 1912, paid in part discharge of the mortgage debt a sum of Rs. 1,000, and that the interest which had accrued on the mortgage debt up to the end of May, 1912, had been duly paid by or on behalf of the mortgagor. On the 11th February, 1917, a sum of Rs. 12,500 was tendered to the mortgagee in discharge of the mortgage. It is not disputed now that this sum was, upon the construction of the mortgage deed adopted by the High Court, sufficient to discharge the mortgage debt due up to that date, but the appellant refused to receive it, stating that it was insufficient. On the 21st August, 1919, the appellant instituted a suit against the mortgagor and his son, alleging, amongst other things, that, according to the terms of the deed of assignment and according to law, the first defendant was bound to pay the interest accruing on the mortgage debt at the rate of 8 annas per month, and that on default in paying this interest the defendant was bound to pay the entire balance of the mortgage debt due at the date of this default with compound interest thereon at the rate of Re. 1 per cent. per mensem from the date of default up to the date of payment, which liability, up to the date of the plaint, was, he alleged, found to be Rs. 21,532-8-6. In respect of this debt he prayed for the usual decree for this amount with subsequent interest thereon and costs.

On the 28th November, 1919, the said defendant filed a statement of defence in which he alleged, *inter alia,* that the plaintiff's construction of the clause in the deed of assignment providing that on default of payment of interest due at any time the appellant was entitled to compound interest at 1 per cent. with monthly rests, was preposterous and penal, that the tender made by him was adequate and proper, that the plaintiff was not entitled to further interest after the date of the tender, and that he, the respondent, was prepared to pay the sum of Rs. 12,500 if the plaintiff would accept it in full discharge of his claim. On the 30th October, 1920, the learned Subordinate Judge of Dindigul delivered judgment in the case, holding that on the proper construction of the vernacular words used in the document (*i. e.*, the deed of transfer), it was clear that compound interest at 12 per cent. was agreed upon, that the rate of interest payable under the suit bond in default of payment of interest every month, was 12 per cent. compound interest. He also held that there was an attempt to tender some amount on the 11th February, 1917, but that Rs. 12,500 was not actually before the plaintiff, and that the tender was neither legal nor valid, and he

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accordingly allowed the plaintiff's claim. A formal decree was drawn up for the amount claimed by the plaintiff with further interest and costs less the sum of Rs. 12,500 paid into Court by the first defendant, and on the 4th July, 1920, drawn out by him. Their Lordships, for reasons to be presently stated, are quite unable to take the same view as the learned Subordinate Judge took as to the proper construction of this suit deed, as it is styled—this deed of assignment.

The learned Judges in the High Court, fortunately, their Lordships think, took an entirely different view from that of the learned Subordinate Judge. They held that the proper construction of the clause in the suit bond, on which the question in controversy was treated as turning, was to this effect, that when each amount of monthly interest became overdue it should carry interest at 12 per cent. up to payment, there being no further rests; that it was conceded by the parties that the amount tendered, Rs. 12,500, was enough to cover the sum due at the date of tender, and that the plaintiff was not entitled to any further sums; that it was admitted before them that the sum of Rs. 12,500 deposited in Court had been drawn out by the plaintiff. They accordingly set aside the decree of the Court below and held that the plaintiff was not entitled to any further decree. Their Lordships think that the conclusion at which the learned Judges of the High Courts arrived was sound and right, but on the question of the proper mode of construing the suit bond there are some important considerations which were not fully dealt with by either Court.

When default is once made on the occasion of the first rest, the debtor thenceforth pays interest not merely on the original debt he owed, but upon a composite debt including the original debt plus the added interest. Now in the present case the loan of Rs. 10,000 is made for three years with interest at ½ Re. per cent. per mensem. This interest is to be paid before the 10th of every month, and a receipt obtained, but if default should be made in payment in this manner, or in getting a receipt, the rate of interest is doubled. But on what is it to be paid ? If it be as compound interest the interest in arrear has sunk into the principal, and the 12 per cent. must be paid on this composite sum. If, on the contrary, interest is only to be paid on the interest in arrear and there is no such sinking, then the rate of interest on the original debt remains unchanged at ½ Re. per cent. and is not doubled. Moreover, if the unpaid

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interest sinks into the principal debt, the debtor loses all right to have it separated again from that debt and dealt with independently. He must therefore pay interest on the composite sum at double the rate reserved upon the principal sum for the whole three years. From the date of default ½ Re. per cent. per mensem could no longer be paid on anything.

It is scarcely possible, their Lordships think, to conceive that men of ordinary intelligence could put themselves in such a hopeless position, and a construction of the document which brings out these results must, they think, be erroneous.

Again, it appears to their Lordships that the Subordinate Judge allowed his mind to be concentrated too much on the words "pay *interest* on *interest*" used in the sentence, "If he fails to pay in that manner he shall pay 'interest on interest' at the rate of 1 per cent." These words fairly enough refer to interest to be borne by a sum in arrear, if that sum was payable as interest.

But it has been long ago, and many times, decided that written documents must be construed as a whole; that each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be ascertained.

In *Barton* v. *Fitzgerald* (1) Lord Ellenborough said:—

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense."

Again, in *Sicklemore* v. *Thistleton* (2) Lord Ellenborough again said:—

"According to the authority of *Browning* v. *Wright* (3) covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument so as to make one entire and consistent construction of the whole."

In the case of *Elderslie Steamship Company, Ltd.* v. *Borthwick* (4) Lord Halsbury said:—

"My Lords, I do not think it necessary to quote any authority in this case. Construing the instrument (*ie*, the bill of lading) and applying to it the ordinary canons of construction, I must merely move your Lordships that the appeal be dismissed. It seems to me that if what has been called the large print had stood alone, I should not have had the slightest doubt that it would have carried the shipowner the whole way. I can

1. (1812) 15 East 530.
2. (1817) 6 M.& S 9 at 11.
3. (1799) 2 Bos. & P 13.
4. (1905) A C 93.

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give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to include an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can. You must read it as a whole. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this is one contract, and each of the parts must be read so as to give effect to the whole, if it can."

Applying these principles of construction to the present case, their Lordships do not think that such dominating force and meaning can be given to the ambiguous phrase "interest on interest" as would lead to results, which clash with the plain and clear objects and meaning of the natural and unambiguous provisions of the document.

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed. The appellant must pay the costs.

Solicitors for appellant : *Douglas Grant* and *Dold.*

Solicitors for respondents : *Chapman, Walker* and *Shephard.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

V. P. R. V. Chockalingam Chetty ... *Plaintiff** (*Appellant*)

v.

Seethai Ache and others ... *Defendants* (*Respondents*).

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Official Assignee's duty, as officer of Court, not to encourage useless litigation—Sale by Official Assignee of a mere right to sue—When time for appeal expires, successful litigant acquires a substantive right of a valuable kind—Civil Procedure Code, O. 1, *R.* 10, and *Limitation Act, S.* 22—*Parties added by Court after institution of suit; rights previously acquired by them under Limitation Act, not prejudiced—Civil Procedure Code, O.* 41, *R.* 20—"*Interested in the result of the appeal*"—*Defendant, against whom suit is dismissed, not so interested—Discretion of Appellate Court to add a defendant as respondent for purpose of passing decree against him, under O.* 41, *R* 33, *Civil Procedure Code.*

It forms no part of the Official Assignee's duty as an officer of the Court charged with the realization of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation.

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*P. C. Appeal No. 109 of 1926. 28th October, 1927.

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Sales by an Official Assignee in insolvency of lands in possession of alienees from an insolvent are, in substance if not in form, nothnig more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act, against the transfer of a mere right to sue (cf. S. 6, clause (*e*) as read with S. 2, clause (*d*) of the Act), they are open to the same objections, and are strongly to be deprecated.

Where a suit has been dismissed, the successful defendant's right, upon the termination of the time allowed for appealing, to hold the decree in his favour, is a substantive right of a very valuable kind of which he ought not to be lightly deprived.

[See I L R 41 Mad. 412 at p. 416 (P C), per Sir Lawrence Jenkins, and I L R 41 Mad. 904 at p. 919 (F B), per Sir John Wallis, Chief Justice, K J R].

When parties are added by the Court after the institution of a suit under O. 1, R. 10, sub-rule (2), Civil Procedure Code, 1908, the Limitation Act, S. 22 provides that the date when they are so added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation, and the rights, if any, which they may have previously acquired under the Limitation Act, are thus sufficiently safeguarded.

O. 41, R. 20, Civil Procedure Code provides for the case of a party to the suit in the lower court whom the appellant has not made a party to the appeal. The Rule empowers the Appellate Court to make such person a respondent when it appears to the Court that "he is interested in the result of the appeal". These latter words must be given their natural meaning and cannot altogether be disregarded in construing the Rule. A defendant against whom a suit has been dismissed and who has not been impleaded as a respondent, within the prescribed time, in an appeal filed by the plaintiff against the other defendants, is obviously not a person who "is interested in the result of the appeal" within the meaning of O. 41, R. 20, and, in any case, the *onus probandi* rests on the plaintiff-appellant, who moves the Appellate Court to exercise its powers under this Rule, to show what is the nature of the interest of the defendant so sought to be made a respondent to the appeal. *Held*, also, that the plaintiff-appellant in this case had failed to discharge that onus.

Where, upon dismissal of a suit against all the defendants, the plaintiff fails to appeal against the decree in so far as it affects some of them and allows the appeal as against them to become barred by time, the Appellate Court would be justified, in the exercise of its discretion, in refusing to take action under O. 41, R. 33, Civil Procedure Code so as to deprive such defendants of the very valuable right which they had acquired in consequence of the plaintiff-appellant's omission to make them respondents within the time limited for filing the appeal.

Semble : Under O. 41, R. 33, Civil Procedure Code, the Appellate Court is empowered, *in a proper case,* to add a defendant as respondent to the appeal for the purpose of passing a decree against him.

Appeal (No. 109 of 1926) from a judgment and decree of the High Court, Rangoon (Young and Baguley, JJ.), dated the

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1st July, 1924, confirming on appeal the decrees of the District Judge of Pegu, dated the 29th July, 1922.

The material facts are given in their Lordships' judgment, and also in the report of the case in the Court below (see I L R 2 Rang. 541).

The main question for determination before their Lordships was whether the Appellate Court in India rightly refused leave to the appellant to bring on the record certain parties who had been joined as defendants in the suits, but for some reason or other had not been joined as parties to the appeals, and whether the said Court was right in dismissing the appeals on the sole ground that those persons were necessary parties thereto.

Lowndes, K. C. and *Jardine* for appellant.

Dunne K. C. and *Raikes* for respondents.

28th October, 1927. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS :—The point for decision in these appeals from the High Court at Rangoon is a very short one, but there is one other matter dealt with by the Trial Judge to which their Lordships desire to refer in the first place—the transaction by which the plaintiff acquired the right to sue for these and other properties in Burma, now valued by him at three lakhs of rupees, from an Official Assignee in Insolvency in another Province for the trifling sum of Rs. 580, which could be of no real advantage to the insolvent estate, having regard to the extent of the liabilities.

The lands in Burma, which are the subject of these two consolidated suits in the District Court of Pegu, were acquired by a joint Hindu family of Nattukottai Chetties, a moneylending community residing with their families in what is now the Ramnad District in the south-east of the Madras Presidency, and carrying on business by their agents in other parts of India, Burma, the Straits Settlements and elsewhere. The family was known in Burma as the K. P. firm, these being the distinctive initials prefixed to all their business signatures according to the practice of the community.

In 1908 K. P. Ramanathan Chetty, a young man who had recently succeeded his father as managing member of the family, finding that the Burma agency was in difficulties, got the other members of the joint family to join with him in executing a deed of trust by which they transferred the properties mentioned in the schedule to the deed to a trustee for the benefit of their creditors. The trustee was empowered, among other

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things, to sell the scheduled properties and invest purchasers with full proprietary rights therein, but was to act in certain matters with the consent of another person described in the deed as a "coadjutor."

In 1911 the first defendant's firm, who held two decrees against the K. P. firm for over Rs. 72,000, were pressing for payment, and it was arranged that certain properties in the Pegu District, included in the trust deed, should be transferred to them in satisfaction of their claim. A deed of transfer was accordingly executed on the 1st December, 1911, in Burma by the duly authorised agents of the trustee under the deed, and K. P. Ramanathan, the managing member of the family.

Satisfaction was duly entered up, and the first defendant took and remained in possession without any question being raised by anyone until some six years later the present plaintiff, V. P. R. V. Chockalingham Chetty, a member of the same community as the K. P. family, who was employed in Rangoon as the agent of another firm, obtained a transfer from the Bank of Bengal of a decree against the K. P. firm for Rs. 90,000, in consideration, the District Judge states, of a payment of Rs. 2,500, and proceeded to attach as the properties of the judgment-debtors the lands which had been conveyed to, and were in possession of the first defendant. Finding, however, that the attachment proceedings must prove infructuous owing to the fact that the two senior members of the K. P. family had been adjudged insolvents on their own petition in January, 1918, in the Court of the District Judge of Ramnad at Madura, the plaintiff went over from Burma to Madura, and on the 19th October, 1919, presented a petition to the Official Assignee at Madura, alleging that the properties mentioned in a list annexed to the petition, containing some 75 items, had either been sold benami for the benefit of the insolvent or obtained in the name of his agent or agents with the same object, and praying that they should be sold by public auction, as there were numerous persons prepared to bid, and in case no one appeared the petitioner was prepared to purchase them himself.

The affidavit filed in support of the petition has not been exhibited, but the petition itself contains no mention of the point chiefly relied on in the suits, that the sale to the first defendant was not in accordance with the trust deed. It was opposed by the first insolvent, who stated that he had no personal knowledge of the transactions of his agents in Burma, and prayed for further enquiry in order that the truth might be ascertained.

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The next thing that appears is that in December, 1919, the Official Assignee advertised the properties for sale as being part of the insolvents' estate, and on the 26th January, 1920, there being no other bidders, the plaintiff became the purchaser for Rs. 580 of lands which he stated in his evidence to be worth three lakhs of rupees, the lands now in suit being valued at Rs. 40,000, and the remainder, for which he proposed to institute other suits, at Rs. 2,60,000.

The District Judge found that the plaintiff's allegation that the sales in question in these suits were benami for the K. P. family was made recklessly and without any foundation, and described his conduct in this matter as most astounding and repugnant. He also criticised the Official Assignee for not making further inquiry as to whether the insolvents had properties in Burma in the names of their agents, and inferred from the insignificant price which the Official Assignee accepted that he attached very little weight to the plaintiff's case that these valuable properties still formed part of the insolvents' estate. It seems difficult to resist this inference; but, however this may be, their Lordships desire to observe generally that it forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. Further, sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections, and in their Lordships' opinion are strongly to be deprecated. In the present case, as already pointed out, there was not even any corresponding advantage to the insolvent estate.

Having obtained the transfer, the plaintiff proceeded to file two suits in the District Court of Pegu, which were tried together, against the first defendant and those claiming through him, in which he not only set up the benami character of the transactions, but also contended that the sale to the first defendant was invalid as not in accordance with the provisions of the trust deed.

The plaint in the first suit alleged that the sale to the first defendant was invalid and inoperative in law; that the sale by

the first defendant to the second defendant, the E. N. M. K. firm, on the 20th December, 1919, was benami for the K. P. firm, which had been adjudged insolvent; and that the sale of the 1st April, 1920, by the second defendant to P. R. N. Nadesan Chetty, represented by the third and fourth defendants, was also benami for the K. P. firm; and that the sales by Nadesan to defendants five to eleven, the defendants in possession, were made fraudulently and collusively with a view to defeating the plaintiff's claim, and were invalid and inoperative. The plaint in the second suit was in similar terms and challenged the transfers made to the first defendant and by the first defendant to the second defendant, Singaram Chetty, the defendant in possession. The District Judge rejected all the plaintiff's contentions and dismissed both suits, holding, as already stated, on the admissions and the plaintiff's own evidence, that the allegation that the sales were benami was made by the plaintiff recklessly and without any foundation.

The plaintiff filed appeals from these decrees to the High Court at Rangoon, but did not make the first and second defendants in the first suit or the first defendant in the second suit parties to the appeals.

The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of title of all the defendants was the sale-deed to the first defendant; that the decrees of the lower court declared the sale-deed to be perfectly valid as between the plaintiff and the first defendant; that owing to the failure to make the first defendant a respondent, there was no appeal from this finding, which had consequently become *res judicata* as between the plaintiff and the first defendant, and must also be regarded as *res judicata* against the respondents, who claimed through the first defendant, or, in other words, as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good carried with it a finding that it was also good as between the plaintiff and the purchasers from the first defendant.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E. N. M. K. firm from the first defendant so long as the findings in favour of the first

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defendant and the E. N. M. K. Firm stand, and are, therefore, of opinion that as regards this part of the case the plaintiff must fail unless the first defendant and the E. N. M. K. firm are made parties to the appeal. The purchase from the E. N. M. K. firm and the subsequent purchases in the first suit and the purchase from the first defendant in the second suit might stand on a different footing were there any evidence worthy of the name to show that they were made benami for the K. P. firm, because the first defendant and E. N. M. K. firm would not be necessary parties as regards these issues, but this contention was not raised either in the Court below or before their Lordships, and may therefore be disregarded.

As regards the rest of the case, owing to the plaintiff's failure to make these defendants respondents within the time limited for filing an appeal, these appeals, so far as they are concerned, are *prima facie* barred by limitation, and they are entitled to hold the decrees in their favour, which, as pointed out by their Lordships in a very recent case, is a substantive right of a very valuable kind of which they should not lightly be deprived. When parties are added by the Court after the institution of a suit under O. 1, R. 10 (2), S. 22 of the Limitation Act provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation, and the rights which they may have acquired under the Limitation Act are therefore sufficiently safeguarded. The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in O. 41, R. 20, on which the plaintiff relied both in the Appellate Court and before their Lordships. That rule empowers the Court to make such party a respondent when it appears to the Court that "he is interested in the result of the appeal." Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants. It was for the plaintiff-appellant, who applied to the Court to exercise its powers under this Rule, to show what was the nature of their interest, and this he has failed to do.

Their Lordships are therefore of opinion that the Appellate Court were right in rejecting his application under this rule.

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The Appellate Court was then asked to take action under O. 41, R. 33. That rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree, and "may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this instance. They are therefore of opinion that these appeals fail on both grounds, and will humbly advise His Majesty that they should be dismissed with costs.

Solicitors for appellant : *Cutler, Allingham & Ford.*

Solicitors for respondents : *Bramall and Bramall.*

K. J. R. *Appeal dismissed.*

Reporter's Note :—Their Lordships' judgment in the above case does not apparently weaken the authority of the proposition, now accepted as law by all the High Courts in India, that the discretion conferred on an Appellate Court by O. 41, R. 20, Civil Procedure Code, in a proper case, of directing a person (who, being a party to the proceedings in the Court below, is interested in the result of the appeal) to be made a respondent, is not limited by any provision of the Indian Limitation Act; see *inter alia,* I L R 14 All. 154 (F B); I L R 33 Cal. 329; I L R 38 Cal. 913 at pp. 918, 919-K J R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AYYANGAR AND MR. JUSTICE REILLY.

Padmanabha Aiyar and another ... *Plaintiffs* (Appellants)*

v.

Sitarama Aiyar and others ... *Respondents (Defts. 1, 2, 4 and 5 to 7 and L. Rs. of 2nd Deft.)*

Padmanabha Ayyar v. Sitarama Ayyar.

Deed—Construction—Mortgage by conditional sale or sale with clause of re-purchase—Distinction—Fixing of date for payment of the mortgage money—If necessary for validity of mortgage by conditional sale—Transfer of Property Act, S 58 (c)—Rule against perpetuities—Applicability to mortgage by conditional sale

A document which for the greater part of its length was an out and out sale-deed contained the following provision at the end "*Anal* (Provided that) whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned therein you should receive it then, execute duly a sale-deed on the stamp paper with regard to these lands in favour of individual No. 1, give it registered, give possession of land, etc., and return all the documents relating hereto." The consideration for the re-sale was the same amount that was specified as the sale price in the document. There was also a direction in the prior portion of the document that the purchaser should obtain the prior debt bonds with endorsements of discharge on them and keep them with him as vouchers in support of the sale-deed. The clause for reconveyance at the end of the document (quoted above) provided for the return of all the documents on payment of the money and no time was fixed on or before which date it was required that the re-sale should be completed.

Held, that the transaction represented by this document was a mortgage by conditional sale and not a sale with a clause for re-purchase.

It is not necessary for the validity of a mortgage by conditional sale that there must be a certain date fixed as the date on which the payment of the mortgaged money should be made. Observations of Maclean, C. J., to the contrary in *Kinuram Mandal* v. *Nitya Chunder Sirdar*, (1907) 6 C. L. J. 208 and the decision in *Haji Mahomed Mozaffer Ali* v. *Asraf Ali*, (1914) 25 I. C. 93, not followed.

In the case of a mortgage by conditional sale there is no future interest in property contemplated to be created and consequently, there is no scope for the application of the rule against perpetuities.

Second Appeal against the decree of the District Court of Salem in A. S. No. 127 of 1922 preferred against the decree of the Court of the District Munsif of Dharmapuri in O. S. No.826 of 1920.

A. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar* for appellants.

B. Somayya for 1st respondent.

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*S. A. No. 1150 of 1924. 10th August, 1927.

Padmanabha Ayyar v. Sitarama Ayyar.

Srinivasa Ayyangar, J.

The Court delivered the following

JUDGMENTS :—*Srinivasa Aiyangar, J.*—My learned brother and myself have recently had quite a number of cases in which the question that arose for determination was the same as in this second appeal, namely, whether on a proper construction of certain documents, read in the light of surrounding circumstances, the transaction between the parties should be held to be mortgage by conditional sale or merely a sale with an agreement to resell. We may observe with regret in passing that, in spite of the differences and variety of judicial opinion with regard to such cases, the legislature, which is clearly in a position to set at rest such questions being raised, has not yet thought fit to do so. Though the question that has arisen in this case is the same as in several other cases, there is at least one distinguishing feature in this case and that is that the transaction has been brought about not as in nearly all other cases by two documents, one of sale and the other an agreement of resale, but that the whole of the contract between the parties is contained in one and the same document.

The facts necessary for appreciating the bearing of the questions that arise may be briefly set out. The document in question was executed by the father of the plaintiffs and the 5th defendant in favour of the father of defendants 2, 3 and 4, one Kamakshi Aiyar. The property however was sometime afterwards sold by defendants 2, 3 and 4 to the 1st defendant. The 1st defendant therefore is the person at present in possession of the property and claiming title thereto. The suit was for redemption on the ground that the document in question was one that effected a mortgage by conditional sale. The defence set up was that on a proper construction the transaction was not a mortgage by conditional sale but was merely a sale with an agreement for a resale, that the condition for resale was not specifically performed and further that the claim for specific performance is barred by the law of limitation. Both the lower courts have found on a construction of the document against the plaintiffs' claim and dismissed their action. Reference may in this connection also be made to an application for amendment of the plaint that was made on behalf of the plaintiffs even in the Court of first instance, when probably it was perceived that the chances were little of the plaintiffs succeeding in their contention on the footing of the transaction having been a mortgage by conditional sale. It was sought by that appli-

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Srinivasa Ayyangar, J.

cation to amend the plaint by setting up in the alternative the agreement to resell and praying on that footing for specific performance of such agreement. The application for amendment was refused not only by the Court of first instance, but, when it was repeated, also by the lower appellate Court. Curiously enough, Mr. Alladi Krishnaswami Aiyar, the learned Vakil for the appellants in this second appeal, wished to argue mainly the question of leave to amend the plaint, though he also indicateed the other question with regard to the nature of the transaction on a proper construction of the document. If it should have become necessary for us to deal with and dispose of this question of the amendment of the plaint, we might have had a great deal of difficulty in the matter. Without discussing the question whether the amendment was in substance within the scope of the cause of action laid in the plaint or not, it is clear that, if such an amendment should be allowed, the Defendant should be accorded another opportunity of pleading to the amended claim or cause of action and the result would practically be allowing the plaintiff to begin a fresh suit *de novo*. But in the view we have taken of the case on the construction of the document, it seems to us unnecessary to discuss this question with regard to the application for amendment.

It is no doubt true that all such questions which have to be solved on a reading of the document, considering the language employed in the light of surrounding circumstances, and so forth, are generally fraught with great difficulty and we have, after giving the matter our earnest and serious consideration, come to the conclusion that, on a proper construction of the document before us, it is a mortgage by conditional sale. We have already adverted to the fact that this is not a case in which the transaction was brought about, as in most cases it is, by two documents either contemporaneous or, though not contemporaneous, as really parts of the same transaction. When parties to a transaction deliberately choose to conclude the transaction and embody it in writing not in one document but in two separate documents, there is always considerable room for the contention that the intention of the parties as disclosed by the fact that they required two documents to embody the transaction is indicated to be that they wished the sale and the resale to be separate legal transactions. Such consideration however is not available in the present case, because the parties have deliberately put in all the terms of the contract in the same document. It is unfortunate that there has been no satisfactory

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evidence of the surrounding circumstances, including the value of the property at the time of the transaction, which might be looked at for the purpose of helping the court in coming to a conclusion as to the real intention of the parties as disclosed in the language employed. We therefore begin this case with the fact that the parties really regarded it as not only a single transaction but as one that was fit and proper to be concluded by the instrument. The clause relating to the agreement for resale comes after the clauses effecting the conveyance and that clause begins with the Tamil word (*Anal*). The expression (*Anal*) clearly indicates that what follows is or should be regarded as a detraction or subtraction from the absoluteness of the sale previously in the document stated to have been made and effected. It may in this connection be noticed that, in form and apart from any personal covenants to pay, a mortgage by conditional sale is effected in all well-established English precedents of conveyancing first by what is purported to be an absolute conveyance of the property with a *habendum* that the purchasers should have and hold the premises absolutely for himself and his heirs, executors, administrators and assigns, subject however to the equity of redemption. The clause relating to the equity of redemption always begins with some such expression as "provided however that" or "provided always". Now in the Tamil language in which this document is drawn up it is impossible to conceive of a word more apt for the purpose of conveying the connotation and significance of a proviso of that character than the word (*Anal*). No doubt it might at first sight shock certain susceptibilities that the decision of such question should be made to depend upon the use of a single word like that. But after all the expression itself must be regarded as clearly indicating the intention and meaning of the parties, and if they did not contemplate by the use of that word to delimit in some manner the absoluteness of the sale therein before in the document stated to have been effected, there is no purpose in the use of the word. The whole of the document must be regarded in construing documents and no single word should be left out of consideration. Giving therefore its true and proper weight to the expression, the only conclusion that is possible to arrive at is that the estate granted by the previous clause, namely an absolute sale, is qualified by the conditions of provisos in this clause. The result then is that this Tamil document has somehow or other come to be framed and worded exactly in the same manner as a

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document of mortgage by conditional sale in English precedents of conveyancing. I shall later on have occasion to refer to the definition in the Transfer of Property Act of a mortgage by conditional sale with special reference to this document, and also deal with the contention of Mr. B. Somayya for the respondents with regard thereto.

The next point to be considered in determining the question whether it was a mortgage or an absolute sale, is the fact that in the document the consideration for the resale is stated to be the same amount that is specified as the sale price in the document. If the sale and the resale should be two different legal transactions, the consideration for the resale is not the amount originally advanced on the sale but some amount which the parties agree to as the consideration for the resale. But when the document states that what has to be repaid is not the consideration agreed to for the resale but the amount originally advanced on the sale, the reference to such amount makes the transaction more consistent with its being a mortgage than an agreement of resale. There is in this document one other somewhat curious provision and that is as follows:—

"This sum you should pay to the said A. Subba Chettiar out of the same amount, get the payments endorsed on the bonds, get them back with his signature and keep them in support of the sale-deed".

The direction and the requirement that the purchaser under this document should obtain these debt bonds with an endorsement of discharge on them and that he should further keep them with him as vouchers in support of the sale-deed would seem rather to indicate that what was intended by the parties was not an outright sale but only a security and the language employed is certainly more consistent with a mortgagee paying the amount of the mortgage for the purpose of discharging the debts of the mortgagor and being required to retain them as vouchers in his hands. If it was an outright sale, it seems difficult to understand why the transferor should have required that the transferee should obtain those bonds and keep them in support of the deed. Reference may also be made to another provision in the document providing for the *return* of all the connected documents on payment of the money. That clause is also calculated to throw some light on the true meaning and the intention of the parties and is certainly more consistent with the transaction being a mortgage than any other. There is however one other and, to my mind, a very conclusive indication in the document that what the parties really intended must

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have been only a mortgage and not a resale. Though the Law Reports are full of cases of this kind and we have had also occasion to come across numerous documents of this nature, still in a proper agreement of resale we have not come across a single case in which there was not some time fixed on or before which date it was required that the other party should complete the transaction. The provision in this case is as follows:

> "But whenever the first individual among us pays you the sum of Rs. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on stamp paper with regard to these lands in favour of the individual No. 1, give it registered, give possession of the lands, etc., and return all the documents relating thereto".

If it was a mortgage, one can easily understand the clause being so worded and leaving it to the option of the mortgagor to pay up the amount at any time and require conveyance of the property. Till that is done, the property is in the possession and enjoyment of the mortgagee in lieu of interest. There is nothing more to be done. But if it should be an outright sale, then, according to this clause, whenever the other party chose to offer this Rs. 500, the purchaser would be under an obligation to reconvey the property. To begin with, it is difficult to understand that parties to an outright sale should have really contemplated entering into such a contract. It is conceivable that, between the date of the sale and the time when the seller or his legal representatives may elect to exercise the option and demand reconveyance of the property on payment of the money, considerable time might have elapsed and the price of the property might have become doubled or trebled. If the conveyance was not regarded merely as security for the money, it would be very strange to suppose that, without any regard whatever to the possible and probable changes in the price of property, the parties agreed to grant a resale and effect reconveyance whenever the other party might wish to demand the same. This provision therefore which fixes no time whatever for the purpose of the resale seems to me almost conclusive on the question now under consideration. For all these reasons and others which it is unnecessary to refer to in detail I have come to the conclusion that on a proper construction of the language employed in Ex. A the transaction embodied in Ex. A was really a mortgage by conditional sale.

Mr. Somayya for the respondents strenuously contended that, even if we should on a construction of the document itself come to the conclusion that it was a mortgage by conditional

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sale, it was not a valid mortgage having regard to the definition of a mortgage by conditional sale as set out in the Transfer of Property Act. S. 58 of the Transfer of Property Act, at first defines a mortgage and then proceeds in the other clauses to define what a simple mortgage is, what a mortgage by conditional sale is, and so on. A mortgage is defined as:

"The transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability".

Therefore with regard to this definition the essential element in a mortgage is the transfer of property by way of security, and that is the question we have been considering with reference to the language employed, and that has already been dealt with. The definition of a mortgage by conditional sale, however, is contained in Cl. (*c*) and is as follows:

"Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute, or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale".

Taking the terms as they are, the necessary element in a mortgage by conditional sale is that there should be an ostensible sale of the mortgaged property. We have it here. Then having reference to the third sub-clause in this clause which is the sub-clause which applies to this case, there should be a condition that

'on such payment being made, the buyer shall transfer the property to the seller'.

Here undoubtedly there is a condition, and it is truly a condition because it is introduced by the word (*Anal*). There is the condition that on payment being made, the buyer shall transfer the property to the seller. Now what Mr. Somayya contended was that the expression 'on such payment' in this sub-clause must be read as referring to the payment referred to in the first sub-clause and on such reference must be construed as a payment of the mortgage money on a certain date. The first sub-clause no doubt refers to the condition being that on default of payment of the money on a certain date the sale shall become absolute. It will be convenient, before referring to or dealing with the cases cited by Mr. Somayya in support of his contention, to examine this contention on its own merits.

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The contention comes to this, that there can be no mortgage by conditional sale at all, unless, whichever may be the sub-clause, there is a certain date fixed as the date on which the payment of the mortgage money should be made. The expression 'on a certain date' should be taken in terms as merely pointing to the certain date as the date on which the payment should be made, not any date either before or after and no doubt Mr. Somayya had, as Holmwood, J., in a case which I shall presently refer to, when pressed by this consideration, was forced, to construe the expression 'on a certain date' as meaning 'on or before a certain date'. What warrant is there in the language of the statute for importing words into it which are not there and construing it in the manner suggested, I really fail to see. It is the *reductio ad absurdum* to which a reading of the statute in that manner leads that has induced Mr. Somayya to contend for the construction, that 'on a certain date' should be taken to mean 'on or before a certain date'. It seems to me that such a construction of the clear terms of the section cannot possibly be accepted. Now going back to the first sub-clause in Cl. (*c*), what the clause speaks of is:

'on default of payment of the mortgage money on a certain date'.

No doubt grammatically 'a certain date' may be related either to the payment or to the default and, having regard perhaps to the genius of the English language either grammatical construction may possibly be accepted. But if we take it to mean that the condition that should happen on a certain date is not the payment but the default in payment, then it is clear that if payment of the mortgage money should come to be made on or before the date fixed there is no default on the certain date which has been fixed and the absurd result which was sought to be avoided by practically importing into the statute words which were not there is steered clear of. Further, if the legislature intended to attach to the expression 'such payment' the requisite, namely that the payment should be on or before a certain date, it is likely that much clearer terms would have been employed to indicate it. It may also be observed that if the contention put forward by Mr. Somayya with regard to the construction of the expression 'such payment' should be accepted, it follows that most documents which have been regarded and adjudicated by Courts of law to be proper deeds of conditional mortgage could not be so regarded at all or could not have been properly so adjudged. The expression 'such

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payment' clearly refers only to the payment of the mortgage amount and if the expression 'on a certain date' is construed as referring to the default and not to the payment there is no difficulty whatever in construing the section or any of the clauses there.

Mr. Somayya however has been able by his industry to produce before us two decisions of the Calcutta High Court in which the view contended for by him has found considerable support. The first case cited by him was *Kinuram Mandal* v. *Nitye Chunder Sirdar* (1). In his judgment in that case no doubt Maclean, C. J., says this:

"It is not necessary to decide it finally, but I do not think there was any 'certain date' of payment within the meaning of sub-section (*c*) of S. 58 of the Transfer of Property Act, and that is an essential element of a mortgage by conditional sale".

This observation was not necessary for the decision of the case and must be regarded merely as an *obiter dictum*. No doubt in that sentence the learned Chief Justice considers that the provision with regard to the certain date must be taken to be present not only in the sub-clause where the words occur but also in the other sub-clauses by the use of the expression 'such payment'. For the reasons already given it seems difficult to accept this expression of opinion of the learned Chief Justice in the case. In a later case reported in *Haji Mahomed Mozaffer Ali* v. *Asraf Ali* (2). Holmwood and Chapman, JJ., held that a certain date of payment within the meaning of sub-section (*c*) of S. 58 of the Transfer of Property Act is an essential element of a mortgage by conditional sale. Then the learned Judges go on to observe as follows regarding the Calcutta case already cited:

"The Chief Justice says in that case that in the particular case before the Court he did not think there was any certain date of payment within the meaning of the section, but he does not lay down that 'on a certain date' means that the tender cannot be made before that date. The certain date which is laid down must according to all rules of interpretation be the last date and it would be both inequitable and impossible to hold that in this country of long distances and poor means of communication a man must go travelling all over the country on the particular day on the chance of finding his creditor and tendering the money to him, and that he could not go on any previous day".

The difficulty, nay the absurdity, of construing the expression 'on a certain date' according to the language employed was really felt by the learned Judges and that seems to be the reason

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why they were at pains to explain it away by stating that according to all rules of interpretation 'on a certain date' means 'on or before a certain date'. But apparently it was overlooked by the learned Judges that if the first sub-clause in that sub-section should be construed as referring 'the certain date' not to the payment but to the default, the whole of this difficulty which they were obsessed with might be avoided altogether. Thus it is clear that there is nothing in the terms of this mortgage which has the effect of not bringing it under the terms of a conditional mortgage as defined by S. 58 of the Transfer of Property Act.

If on a proper construction the transaction was a mortgage no other question really arises.

Mr. Somayya no doubt took the alternative case of the clause being regarded as a mere agreement to resell the property and launched on a learned disquisition with regard to such a clause offending against the rule against perpetuity. But in the view we have taken that the transaction was a mortgage, no question at all arises because the rule against perpetuity can apply only to cases where there is a new interest in immovable property contemplated to be created after the expiry of the time prescribed by the rule, namely the lifetime of a person living and the minority of one who may be in existence then. In the case of a mortgage, however, there is no such future interest in property contemplated to be created because it is of the very essence of the mortgage that the equity of redemption is a present interest in property in exercise of which alone the property is sought to be redeemed. There is also no question of the clause being regarded as a mere personal contract and for that reason held to be invalid, as also of its being void for remoteness. No question arises in this case on the plaint as laid and on the cases of any personal covenant and the enforcement thereof. It seems to me therefore unnecessary to discuss the cases, both English and Indian, that have been cited by Mr. Somayya for this purpose. He has frankly conceded that if the correct view should be that it is a mortgage, no such question can possibly arise.

Both the lower courts therefore were wrong in the view taken by them of Ex. A. I have come to the conclusion that, on a proper construction, it is a deed of mortgage by conditional sale and that the plaintiffs as the mortgagors are entitled to redeem the property within the time prescribed by the law of

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limitation, namely sixty years from the date on which they are entitled to redeem. In this case the clause is:

'whenever the party likes he has the right to redeem'

and therefore the right to redeem accrued to him from the very date of the execution of the mortgage because there is no other term fixed within which the mortgagor is prevented from claiming redemption. No question of limitation therefore can possibly arise. The appeal is allowed and the decrees of both the lower courts are set aside. Instead there will be an ordinary preliminary decree for redemption by the plaintiffs of the suit property. But the case, however, cannot be finally disposed of here, because Mr. Somayya states that issue 7 in the case which relates to the improvements, if any, made by the defendants in respect of the suit property and their right to claim the same from the plaintiffs would have to be gone into and decided before a final decree for redemption is made. The case will have therefore to be sent to the Court of first instance for the determination of that issue both on the facts and on the law. It is stated by the learned vakil for the appellants that at some stage of this litigation the 1st defendant had given a statement to the effect that he did not wish to let in any evidence with regard to that issue. If the Court of first instance should find that there was any such statement given, effect will be given by the Court to such statement in coming to a conclusion with regard to this issue. The Court of first instance will after determining that issue make a final decree for redemption for the proper amount. Except as to the costs which are awarded to the 1st defendant during the trial in the Court of first instance that he should have the costs up to such stage irrespective of the result of the suit, the appellant will be entitled to all the other costs in all the Courts from the 1st defendant. The costs hereafter to be incurred will be provided for by the Court of first instance. The court-fee paid by the appellants in this Court will be refunded to them.

Reilly, J.

Reilly, J. :—I agree that on the face of Ex. A. the transaction represented by it was a mortgage by conditional sale. Here we have a document which for the greater part of its length is an out and out sale-deed, and then at the end comes a provision:

"*Anal* (provided that) whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on a stamp-paper with regard to these lands in favour of the individual No. 1, give it registered,

give possession of the lands, *etc.*, and return all the documents relating hereto".

That, in the language of S. 58 (*c*) of the Transfer of Property Act, appears to me to be clearly an ostensible sale on condition that on payment being made the buyer shall transfer the property to the seller. But Mr. Somayya has contended that there can be no valid mortgage here because no date for payment has been fixed. There is nothing in the idea of a mortgage generally which makes the fixing of a date for payment or a date before which there can be no redemption essential. In usufructuary mortgages it is not unusual that no time for payment should be fixed; and I believe that in equitable mortgages by deposit of title-deeds it is generally the case that no time for payment is fixed. And S. 60 of the Transfer of Property Act itself recognises that no fixed time for payment is an essential characteristic of a mortgage. But Mr. Somayya has contended that a mortgage by conditional sale is of one of the kinds of mortgage for which a fixed time for payment is essential, and he bases that contention primarily on the wording of S. 58 (*c*). In S. 58 (*c*) three conditions are set out which when attached to an ostensible sale make the transaction a mortgage by conditional sale. In sub-clause 1, which deals with the first condition, we find the words:

'payment of the mortgage money on a certain date'.

In sub-clauses 2 and 3 we find only the words "such payment." Mr. Somayya contends that we must read the words 'such payment' in sub-clauses 2 and 3 as equivalent to payment of the mortgage money on a certain date, the words used in sub-clause 1. Grammatically in my opinion the words 'such payment' in sub-clauses 2 and 3 refer to the payment of the mortgage money in sub-clause 1 without the addition of the words 'on a certain date.' Such means 'of the like kind'; but in statutes the word is often used as equivalent to 'of that kind' or even loosely as equivalent to 'that'. If we take it that in sub-clauses 2 and 3 'such payment' means 'payment of that kind' or even 'that payment', we shall be giving full meaning to the expression by reading it as equivalent to 'payment of the mortgage money' without bringing in the additional words 'on a certain date' which convey an additional idea not really connected with 'payment of that kind'. But even if it were possible to read the words 'such payment' in sub-clauses 2 and 3 in two alternative senses, either as equivalent to payment of the mortgage money on a certain date or to payment of the mortgage

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money alone, I think we should be bound to adopt the latter construction. We are considering a condition set out in a statute, and we must be careful not to widen the scope of that condition further than the words compel us to go. If two interpretations are possible, we ought to accept the less onerous one. And, if we look at the sense of these sub-clauses, it is clear that in sub-clause 1 the words 'on a certain date' are necessary to the meaning. That is a default clause, and for the purpose of a default clause, it is necessary that a date should be fixed or fixable, as otherwise no one will know when the default has occured. But there is no such necessity in the meaning of sub-clauses 2 and 3 to mention any date. On the mere interpretation of S. 58 (*c*) as it stands, speaking for myself, I should think it is clear that we have no right to introduce into sub-clauses 2 and 3 the words 'on a certain date.' Mr. Somayya has drawn our attention to *Kinuram Mandal* v. *Nitye Chunder Sirdar* (1) in which Maclean, C. J., clearly stated that a certain date was an essential feature of a mortgage by conditional sale. But that was only an *obiter dictum* and there is no discussion of the matter in the judgment. In *Haji Mahomed Mozaffer Ali* v. *Asraf Ali* (2) two learned Judges of the same Court assumed that that dictum was correct. But again they did not discuss it, though used it as the basis of their discussion on a further point. With great respect I do not think that we can take either of those cases as an authority for the position that the fixing of a certain date for payment is an essential feature of a mortgage by conditional sale.

Mr. Somayya spent a good deal of time in his argument on a contention that anyhow the proviso to Ex. A offended against the rule against perpetuities, or more specifically against the provisions of S. 14 of the Transfer of Property Act. I certainly understood him to be using the contention as an attack upon the theory that Ex. A represented a mortgage by conditional sale; and if that was not his intention at the time, I hardly think he was justified in occupying us for so long on the point at that stage of the case. However, eventually, he has admitted that, if Ex. A represents a mortgage by conditional sale, then the proviso does not offend against the provisions of S. 14 of the Transfer of Property Act. And it is clear that that is so. The proviso does not create any interest after a life or at any future time at all. It merely reserves the right to redeem from the very moment of the document.

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I agree that this appeal must be allowed and that the suit should go back to the District Munsif for him to make a decree for redemption subject to the directions indicated by my learned brother.

N. S. *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

S. Alwar Chetty ... *Plaintiff**

v.

K. Jagannatha Aiyar and 4 others ... *Defendants.*

Alwar Chetty v. Jagannatha Aiyar

Mortgage—Equitable mortgage—Deposit of title-deeds—Letter accompanying—Mortgage if constituted by—Construction of letter—Oral agreement prior to deposit—Valid mortgage if created by—Transfer of Property Act—S. 55—Vendor's lien—Extinguishment—Undertaking by vendee to pay vendor's creditors—Effect—Reconveyance taken by vendor—Effect—Equitable mortgage created by vendee in the interval—Notice of vendor's lien—Sale-deed if amounts to.

Where the letter accompanying the deposit of title-deeds by way of collateral security was as follows:

"As I personally told you yesterday, I send herewith a sale-deed, dated 9th November, 1922...... Kindly accept this deed as collateral security ..... On payment of Rs. 3,000 within the 20th instant, I shall take the above deed",

Held, that that letter clearly constituted the bargain between the parties and was not merely a record of an already completed transaction, and that, the letter being unregistered, no valid equitable mortgage was created.

Quaere: Whether an agreement, made *previous* to the deposit of the title-deeds could constitute a valid equitable mortgage.

Where the consideration for a sale consisted of a cash payment of part of the purchase-money, and an undertaking by the vendee to pay the balance to the creditors of the vendor, and the sale-deed contained the following passage:—"As I have received in the aforesaid manner the said sum of Rs. 1,500" (the entire purchase-money) "you shall yourself enjoy the lands with powers of alienation by gift, exchange or sale", *held,* that the vendor's lien was not extinguished by reason of the vendee undertaking to pay the vendor's creditors.

Where a sale-deed is deposited by the vendee as collateral security for an amount due by him to a third party, and the sale-deed itself shows that a part of the purchase-money was not paid by the vendee and that he had merely undertaken therewith to discharge the debts of the vendor, the person accepting the deed as collateral security is under a duty to

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*C. S. No. 677 of 1926. 21st November, 1927.

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inquire whether the vendee had paid the balance of the purchase-money by discharging the debts of the vendor, and, if the vendee had not in fact so paid the balance, the equitable mortgagee must be held to be a transferee with notice of the charge in favour of the vendor for the balance of the purchase-money which remained unpaid.

3rd defendant, the owner of certain property, sold it to the 1st. A portion of the purchase-money alone was paid in cash, and the balance was undertaken by the first defendant to be paid to the 3rd defendant's creditors. The first defendant deposited the sale-deed as collateral security for an amount due by him to the plaintiff. As the first defendand had not discharged the debts of the 3rd defendant as per his undertaking, the 3rd defendant took a reconveyance of the property from the 1st, subsequent to the date of the equitable mortgage in favour of the plaintiff. No cash was paid for the reconveyance, the consideration fixed practically representing the aggregate of the debts which the 1st defendant had undertaken to discharge.

Held, that the lien which the 3rd defendant had for the portion of the purchase-money which was not paid by the first defendant was not lost by the transaction of the reconveyance and would have priority over the plaintiffs' equitable mortgage.

T. C. A. Anandalwan for plaintiff.

T. C. A. Bashyam for 2nd defendant.

S. Krishnamurthi Aiyar and *S. Panchapakesa Sastri* for 3rd and 4th defendants.

N. Purushothama Aiyangar for 5th defendant.

The Court delivered the following

JUDGMENT :—The contest in this case is between the plaintiff and the 3rd defendant. It relates to two questions:

(1) Is the equitable mortgage in favour of the plaintiff valid?

(2) Has the 3rd defendant a vendor's lien for unpaid purchase-money, which can be enforced?

The 1st defendant mortgaged with the plaintiff on the 27th of June, 1918 his house at Madras for securing a sum of Rs. 8,000, which was lent. The mortgage was effected by a registered deed. The first defendant made continued default in payment and the plaintiff thereupon threatened to bring the property to sale. It was at this juncture that the alleged equitable mortgage was made. The first defendant wrote to the plaintiff on the 1st February, 1926 thus:

"As I personally told you yesterday, I send herewith a sale-deed, dated the 9th November, 1922 * * * * Kindly accept this deed as collateral security * * * * * On payment of Rs. 3,000 within the 20th instant, I shall take the above deed * * * "

The object was to secure the payment of a part of the amount already due under the original mortgage. I may add

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that this transaction relates to a mofussil property. The contention of the 3rd defendant is, that the letter of the 1st February constitutes the contract, and, that as it has not been registered, no valid equitable mortgage has been created. The question in such cases is, does the document in question constitute the bargain between the parties? If it does, the writing excludes oral evidence and no such evidence can be given. If it then be held that the contract is contained in the writing, the same becomes inadmissible in evidence for want of registration. The result is, that the equitable mortgage cannot be proved. The point then is, was there a contract independent of this writing or was the writing itself the contract? I do not propose to deal in any detail with the law, as I have fully considered the point in a recent case, *Ramakrishna Doss* v. *Kesavulu Chetti* (1). The letter in the present case closely resembles that in *Subramanyan* v. *Lutchman* (2). It clearly constitutes the bargain between the parties and is not merely a record of an already completed transaction. I must therefore hold that no valid equitable mortgage was created in favour of the plaintiff.

For the latter, it was next argued that I must hold that there was an oral agreement on the 31st of January, that is, the day previous to the letter in question. There is literally no evidence that there was such an agreement. The plaintiff refers in his plaint in two places, to the fact that the mortgage was made on the 1st February, 1926. There is thus no substance in this contention. In the circumstances, it is unnecessary to enquire whether an agreement, made *previous* to the deposit of the title-deeds, can constitute a valid equitable mortgage.

The next point relates to the vendor's lien claimed by the 3rd defendant. He was originally the owner and he sold the property to the 1st defendant by a sale-deed, dated the 9th of November, 1922. The price agreed upon was Rs. 1,500 and is made up of three items:

(1) Rs. 125 paid in cash;

(2) Rs. 1,000 which the purchaser was directed to pay to one *K*, to whom the vendor owed money, on a promissory note, dated 19th October, 1919;

1. (1927) 53 M L J 179.
2. (1926) L R 50 I A 77: I L R 50 C 338 : 44 M L J 602 (P C).

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(3) Rs. 375 which the purchaser was directed to pay to one *S*, to whom the vendor owed money, on a promissory note (date not given).

The consideration is thus in two parts. It consists of a cash payment and an undertaking by the first defendant to pay the creditors of the vendor. It has been proved that the former did not make any payment to either *K* or *S* and that, as a matter of fact, the debts were fully discharged by the vendor himself long subsequent to the sale. It is not suggested that there was a novation of the contract by reason of the arrangement set forth in the sale-deed, that the liability of the vendor to pay his debts was extinguished and that, with the consent of his creditors, the liability of the first defendant was substituted for it. It is thus apparent that there was a part of the purchase-money owing to the vendor and the question is : was the lien extinguished by reason of the first defendant agreeing to pay the 3rd defendant's creditors? The point is dealt with in *Webb* v. *Macpherson* (3). In that case the price was Rs. 81,210 of which Rs. 30,000 was to be paid down in cash and the balance Rs. 51,200 was to be secured by a deed to be executed. It was held that the agreement to defer the payment of the balance did not exclude the operation of the charge, the fact, notwithstanding, that a separate security was taken in respect of that sum. The question to be asked in such cases is, is the agreement in any way inconsistent with the existence of the charge? Their Lordships held in that case that it was not. The question in its present form arose pointedly in *Sivasubrahmania Aiyar* v. *Subrahmania Aiyar* (4). It was there held that a contract to forego the vendor's charge is not to be necessarily inferred from the fact that either the whole or a part of the price was to be paid by the purchaser to a third party on behalf of the vendor. It is contended for the plaintiff that the words in the sale-deed in question clearly exclude the operation of the charge. The passage in the sale-deed relied upon is:

"As I have received in the aforesaid manner the said sum of Rs. 1,500 * * * * You shall yourself enjoy the said lands * * * * with powers of alienation by gift, exchange or sale".

One must not lose sight of the very important words in this extract, namely, *"in the aforesaid manner"*, which show

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3. (1903) L R 30 I A 238 : 31 C 57 : 13 M L J 389 (P C).
4. (1916) I L R 39 M 997 : 31 M L J 530 (F B).

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that a part of the price remained unpaid. The statement that the whole price was received is a formal statement and is qualified by the preceding words, and it is the entire document that must be looked at. However, in view of this contention, I have sent for the printed papers of the case reported in *Sivasubrahmania Aiyar* v. *Subrahmania Aiyar* (4) and I find that the words in the sale-deed in that case are identical with the words in the sale-deed before me. The plaintiff's contention fails and I must hold that the 3rd defendant's charge was not lost.

The next point to decide is, is the plaintiff a transferee with notice of the charge? On the evidence, I am disposed to believe that the plaintiff did not have actual notice, but that is hardly necessary. Under *S. 3 of the Transfer of Property Act,* a person is said to have "notice" of a fact when he actually knows that fact, or, when but for gross negligence, he would have known it. The very sale-deed, which was deposited with the plaintiff, shows that part of the purchase-money was unpaid. It was his duty to have enquired whether the 1st defendant subsequently paid the balance by discharging the debts of the vendor. This was an inquiry which he ought to have made and his abstention from that enquiry amounts to negligence. The case directly in point is *Bank of Bombay* v. *Suleman Somji* (5). In that case the testator died in 1885, leaving by a will, to his four elder sons, certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons and made his four elder sons executors of the will. The latter, after their father's death, became indebted to the Bank of Bombay and on the 12th of January, 1899 executed a mortgage of this property in favour of the Bank without stating the charge upon it. In one of the documents of title deposited with the bank, the title of the mortgagors was indicated and had the Bank investigated the title they would have become aware of the will and the charge created thereby on the property. It was held that the Bank had constructive notice of the charge and the claim of the younger sons prevailed. The Judgment of Sir Lawrence Jenkins, C. J., and Batty, J., was upheld by the Privy Council. The Judgment of the Appellate Court is given in the report. It shows that, if the Bank had made proper inquiry, they would have become cognisant of the will. It further shows (and this

4. (1916) I L R 39 M 997 : 31 M L J 530 (F B).
5. (1908) L R 35 I A 139 : 33 Bom. 1 : 18 M L J 435 (P C).

is important) that it would then become the duty of the Bank to enquire whether the legacy had been discharged or not. In the present case, if the plaintiff had looked at the sale-deed, he would have found that there was a portion of the price which originally remained unpaid. If he had pursued the inquiry properly, he would have known that the 1st defendant did not carry out his undertaking and discharge the debts. The plaintiff, therefore, must be held to have had constructive notice of the charge. Thus, even granting that his equitable mortgage is valid (and I have held that it is not), the 3rd defendant's charge must prevail over his mortgage.

In connection with the contention relating to the charge, there remains one further point to deal with. The 3rd defendant, finding that the 1st defendant failed to carry out his undertaking to discharge the former's debts, took a reconveyance of the same property on the 3rd of July, 1926. The consideration is stated to be Rs. 1,500. No cash was really paid, but the amount was in fact the aggregate of the debts which the 1st defendant had agreed to discharge, less Rs. 325, the sum waived when this reconveyance was executed. What really happened was this: When the 3rd defendant found that it was hopeless to get the 1st defendant to carry out his undertaking, the former got the property reconveyed to himself. The alleged equitable mortgage in favour of the plaintiff was created, as I have said, on the 1st February, 1926, and the date of the reconveyance is the 3rd of July, 1926. For the plaintiff, it is contended that the vendor's charge became extinguished by reason of this transaction. This argument is scarcely tenable. *S.* 101 *of the Transfer of Property Act,* directly applies to the case and the material portion of it runs thus:

> "Where the owner of a charge on immoveable property becomes absolutely entitled to that property, the charge shall be extinguished unless such continuance would be for his benefit."

The principle underlying the section is this. Supposing the mortgagee purchases the interest of his mortgagor; if there was an intermediate encumbrance at the time of his purchase and he was aware of it, the question arises, what was his intention when he purchased the property? Did he intend to keep his mortgage alive or to extinguish it? If he was not aware of the intermediate encumbrance, there can, in the very nature of the case, be no question of intention and the section assumes that the charge continues to subsist, the continuance being manifestly in his interests. As it is sometimes put, the

intention to keep alive his charge is ascribed to him, the rule being, that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. *S.* 101 is but an instance of the application of the doctrine of subrogation. The case relied upon for the plaintiff *Bai Rewa* v. *Vali Mahomed* (6) is not in point. As is pointed out in the judgments in that case, there was no mesne incumbrance outstanding at the time. That distinguishes that case from the present. I hold therefore that the charge in favour of the 3rd defendant was not lost and, even if it be assumed that the equitable mortgage is valid, the charge has priority over it and must prevail.

The suit therefore against the 3rd defendant stands dismissed. This disposes of the case so far as the property in the mofussil is concerned.

Now turning to the other part of the case, there is no contest. It relates, as I have said, to the property at Madras. There is a first mortgage in favour of the 2nd defendant, dated the 19th June, 1916, for Rs. 15,000 and a second mortgage in favour of plaintiff, dated the 27th June, 1918, for Rs. 8,000. There has been no re-payment and the plaintiff is entitled to Rs. 8,000 with interest at 9 per cent. per annum from the 1st May, 1926, to the date fixed for sale and with further interest at 6 per cent. on the aggregate amount thereafter. Similarly, the 2nd defendant is entitled to Rs. 15,000 with interest at 8 per cent. per annum from the 1st August, 1925, to the date fixed for sale and with further interest at 6 per cent. on the aggregate amount thereafter. I accordingly pass a mortgage-decree. Time for redemption is 2 months. The 1st defendant shall pay the costs of the plaintiff and the 2nd defendant.

As the plaintiff has failed as against the 3rd defendant, I must direct him to pay the latter's costs calculated upon the value of his interest; but I must make an order that the plaintiff shall get these costs ultimately from the 1st defendant. The latter is a High Court vakil and in his conveyance, dated the 3rd July, 1926, he makes a definite statement that there are no encumbrances on the property He further represented to the 3rd defendant that he was not in a position to produce the original sale-deed, as it had become mixed up with his papers and search was necessary. At that time he had parted with that deed to the plaintiff intending to create an equitable mortgage. The statement he made was a gross falsehood. He

6. (1922) I L R 46 B 1009.

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intended to deceive either the plaintiff or the 3rd defendant and in the event has succeeded in deceiving the plaintiff. That is the reason for this order I have made in regard to costs.

A. S. V. *Suit dismissed and costs allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE CURGENVEN.

Raju Naidu ... *Appellant** (*Plff.*)

v.

Kanakku Pillai *alias* Ramaswami Pillai . ... *Respondent* (1*st Dcft.*).

Raju Naidu v. Kanakku Pillai.

Contract Act—S 96—Delivery of goods—Contract for—Payment to be made before delivery—Condition as to—Refusal to deliver except on payment of balance due—Right of—Time not of essence of contract—Section not confined to specific ascertained goods.

The plaintiff entered into a contract for the cutting of a certain number of bunches of plantains belonging to the 1st defendant. Under the contract the sum payable by the plaintiff to the 1st defendant for being allowed to cut the bunches was to be paid in certain instalments, the last instalment falling to be paid on 11th April, 1920. On 4th May, 1920, the plaintiff claimed to proceed with the cutting of the plantains, but, as there was then a considerable balance due by him, the 1st defendant refused to permit him to cut the remaining bunches until he was paid the balance.

Held, that, under S. 96 of the Contract Act, though time was not of the essence of the contract, the 1st defendant was entitled to insist on the payment of the balance before permitting the cutting of the remaining bunches.

S. 96 of the Contract Act is not confined to cases of specific ascertained goods.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Trichinopoly in A. S. No. 89 of 1924, preferred against the decree of the Court of the District Munsif of Kulitalai in O. S. No. 649 of 1920.

L. A. Govindaraghava Aiyar for appellant.

S. Varadachariar and *K. S. Champakesa Aiyangar* for respondent.

The Court delivered the following

Srinivasa Aiyangar, J.

JUDGMENTS :—*Srinivasa Aiyangar, J.* :—Though a number of interesting and difficult questions bearing on the law of contracts were raised in the course of the discussion of this second appeal, it comes about that the appeal can be disposed of on a

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* S. A. No. 1343 of 1924. 22nd August, 1927.

comparatively narrow point. The plaintiff is the appellant. He instituted the suit primarily against the 1st defendant for the recovery of certain amounts alleged to have been overpaid by him under a contract and for damages for breach of contract. The contract itself was in writing bearing date 19th Dec., 1919. Under it a sum of Rs. 5,514-4-0 was settled as the price payable in respect of 8050 bunches of plantains and this amount was agreed to be paid by instalments on various dates. The plaintiff and defendants 2 and 3 who were also parties to the contract agreed to pay interest on the amount of each instalment at 1 per cent. from the date of default. It is in evidence that on or about the 4th May, 1920, the plaintiff went to the 1st defendant and asked him leave to cut and remove the remaining bunches of plantains. It is really undisputed that on that occasion the 1st defendant refused to allow the plaintiff to cut any more bunches of plantains until and unless he paid the 1st defendant the whole of the balance due under the contract. It must be observed before we proceed that the last instalment payable by the plaintiff and defendants 2 and 3 to the 1st defendant under the contract was the sum of Rs. 1,514-4-0 and the date fixed for the payment of the same was 11th April, 1920. It is also undisputed that on or about the 4th of May. a sum of Rs. 500 odd still remained due and unpaid out of this amount. The question that naturally arises for determination first in such a case is whether the dates fixed for the payments of these amounts could be regarded as being of the essence of the contract. If that question had to be finally decided, we might have felt some difficulty in coming to a satisfactory conclusion. Both the lower courts have held that time was not of the essence of the contract. Mr. Varadachariar however argued that on a proper construction time should be regarded as having been made of the essence of the contract by the parties. However, it is not necessary to determine that question because Mr. Varadachariar, the learned vakil for the respondent has argued the question even conceding that the time should be regarded as being not of the essence of the contract. The plaintiff's case was that till the 4th May, he had overpaid the 1st defendant having regard to the number of bunches already cut and removed by him and defendants 2 and 3, and that he was ready and willing to pay the balance but that the 1st defendant however refused to allow the plaintiff to cut any more bunches until and unless the whole of the balance was paid up. The District Munsif in the trial Court gave a

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decree to the plaintiff but on appeal his decree was reversed and the plaintiff's suit was dismissed.

On appeal before us Mr. Govindaraghava Aiyar on behalf of the plaintiff-appellant contended that on the refusal of the first defendant to allow the plaintiff to cut any more bunches of the plaintains there was a breach as time was not of the essence of the contract and that therefore the plaintiff was entitled to damages. He argues that subsequent to this breach by the first defendant the first defendant and defendants 2 and 3 colluded with each other for the purpose of defrauding the plaintiff of his just rights and made up a fraudulent settlement between themselves and that such settlement could not affect the plaintiff. The plaintiff's cause of action is based on the alleged breach of contract by the 1st defendant and it is only if we should take the view that the first defendant did commit a breach of contract, any further questions which have been argued before us could possibly arise. The position then was, this, the last day for the payment of the last instalment under the agreement had long ago passed, namely, the 11th April, 1920. There was still a balance due and payable. The first defendant said unless such balance was also paid up he would not allow the plaintiff to cut and remove the bunches. Though time was not of the essence of the contract, still the plaintiff was at that date a person who had already committed at any rate a breach of covenant with regard to the time fixed for the performance of the contract. Assuming therefore that, time not being of the essence of the contract, it was not open to the first defendant to rescind the contract merely because the plaintiff failed to pay the last instalment on the due date, still Mr. Varadachariar argued that under the terms of S. 96 of the Indian Contract Act the first defendant was entitled to refuse to perform the contract and deliver the goods because the time appointed for payment had arrived before the delivery of the goods and therefore the right given to the vendor in such circumstances by that section had accrued to the first defendant seller. In the first part of that section it is provided that if there was an agreement to deliver the goods and take payment afterwards, the seller is bound to deliver the goods and has no lien and the second clause of that section provides that if the buyer becomes insolvent before delivery of the goods or if the time appointed for payment arrives before delivery of the goods the seller may retain the goods for the price. It must be observed that what the section provides is not any cancellation

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or rescission of the contract or any right consequent thereon but a new kind of right given to the seller if the contingency should arise as provided in the section. If the buyer should become an insolvent before delivery of the goods is made, then the right is given to the seller to keep the goods in lieu of price, that is, he may elect practically to cancel the remainder of the contract, but there will be no outstanding rights or obligations in respect thereof. Similarly, if, before delivery of the goods is effected, the time for payment under the contract had arrived and therefore the purchaser was at default already with regard to the payment of the price, then also this right is given to the seller to keep the goods in lieu of the price. Mr. Govindaraghava Aiyar argued that this section must be properly construed as merely referring to ascertained goods or to goods which under the law must be regarded as already sold to the purchaser or, in other words, goods, the property in which must be deemed to have passed to the purchaser. There is no warrant for narrowing the construction of this clause in that manner. All that the section speaks of is delivery of the goods and goods have to be delivered whether according to the contract they are ascertained or unascertained at the time of the contract. Mr. Varadachariar has referred us in this connection to *ex parte Chalmers In re Edwards* (1). In that case the learned Judge held that when the purchaser became an insolvent, the obligation on the seller ceased to effect any further delivery according to the contract and at p. 292 Mellish, L. J. clearly states that for that purpose "it would make no difference whatever that the goods were not specific goods, and referring to the case of *Valspy* v. *Oakeley* (2) the learned Judge says that that case is conclusive to show that it does not make any difference whether the goods" were specific or ascertained or not and the learned Judge also agreed with that view. In fact the principle underlying S. 96 is merely the application to a particular case of the principle underlying S. 51 of the Indian Contract Act. No party to a contract need perform his part of the contract when the other party to the contract is not ready and willing to perform his part of the contract. If therefore the date fixed for the payment has already expired, then it is clear that the person who has made default cannot possibly be described as a person who is ready and willing to perform his part of the

1. 8 Ch. App. 289. 2. 16 Q. B. 941.

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contract because his contract itself is a contract to pay on a particular date and even if time was not of the essence of the contract, still in order to make himself out to be ready and willing he was bound at least to tender the amount of the balance when called upon to do so. This he refused to do and thereupon the first defendant was entitled to refuse to perform his part of the contract, namely, that of allowing the plaintiff to cut any more bunches in his garden. I did not understand Mr. Govindaraghava Aiyar to attempt any answer to this argument based on S. 96 of the Contract Act except that on a proper construction *the case referred to in that section must be limited to specific ascertained goods, and, as already observed, there is no warrant for narrowing the construction of that section in that manner.* There is also no legal principle that it should be so narrowed down. If there is a person who has failed to pay on the due date, then he is really a person that has failed to carry out his part of the contract and the other party according to this section then acquires a right of setting off the goods against the price and in that view therefore the finding in this case should be that there was no breach of contract at all by the first defendant because he was in the circumstances entitled to refuse to deliver any more goods.

In that view it becomes unnecessary to discuss any question raised which had reference to the point whether payment to one of the joint promisees alone would have the effect of discharging the obligations under the contract. It is therefore unnecessary to express any opinion with regard to it and there is no necessity certainly of having the question referred to the consideration of a Full Bench as suggested by Mr. Govindaraghava Aiyar because we are satisfied that that question does not arise for the determination of this appeal. In the result therefore the second appeal is dismissed with costs.

Curgenven, J.

Curgenven, J. :—I agree that however the other question raised in the hearing of this appeal might have been decided, the plaintiff has no cause of action and the first defendant did not commit breach of the agreement Ex. I. This contract consisted in a joint undertaking by the plaintiff and the 2nd and 3rd defendants to pay a sum of money in certain instalments, the last instalment falling to be paid on the 11th April, 1920. Some instalments were paid after the due date and on the 4th of May, 1920, when the plaintiff claimed to proceed with the cutting of the plantains, there was still a

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considerable sum outstanding. The question is whether, time not being of the essence of the contract, it was open to the first defendant to insist on the payment of the balance before permitting the cutting of the remainder of the bunches of plantains. The answer to this question appears to me to be clearly contained within the terms of S. 96 of the Contract Act, namely, that if the time appointed for payment arrives before the delivery of the goods the seller may retain the goods for the price. The only objection which I think arises to be dealt with as to the application of this section is that the goods contemplated under it must be ascertained. The section reproduces the English Law of Contract upon the subject and it has been held by Mellish, L. J., in *Ex parte Chalmers. In re Edwards* (1), on the authority of an earlier case, *Valpy* v. *Oakley* (2) that in closely similar circumstances delivery being withheld in view of the insolvency of the vendee, the circumstances that the goods were not specific goods, that is to say, not ascertained, would make no difference to the application of the principle. Mr. Govindaraghava Aiyar's argument comes to this, that the plaintiff would have been entitled to cut the plantains because up to the moment of severance they were not ascertained goods, but that, having cut them, although, they were perishable goods, he would not be entitled to remove them because by cutting them the goods became ascertained and the provisions of S. 96 would apply. I can see no reason for drawing a distinction of this unreasonable character, nor can I see ground in the language of the section to hold that it does not apply to cases in which the goods have not been ascertained. I agree accordingly that the 1st defendant committed no breach of the contract and therefore that no action would lie. Accordingly I agree with the order proposed by my learned brother.

A. S. V. *Appeal dismissed.*

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1. (1873) 8 Ch. App. 289. 2. (1851) 16 Q. B. 941.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT :—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Sir Bissessar Das Daga and others ... *Appellants** (*Decree-holders*)

v.

Emmanuel Vas and others ... *Respondents* (*Judgment-debtors*).

P. C.

Sir Bissessar Das Daga *v.* Emmanuel Vas.

Construction of compromise decree—Payment of damages not a bar to specific enforcement.

A compromise decree provided (by clause 2) that the judgment-debtors would be restrained from selling or otherwise alienating manganese ore from their mines to any third party until they had delivered certain quantities of the ore to the decree-holders, the deliveries being spread over a period of 8 years. Clause 10 of the compromise made provision for non-delivery in any particular year and imposed a liability on the judgment-debtors to pay damages to the decree-holders at a rate therein specified. *Held,* reading the contract (*i. e.,* the compromise decree) as a whole and taking all its terms together, that the judgment-debtors could not take advantage of their own wrong and repudiate their obligations under the contract by merely paying to the decree-holders the penalty calculated in accordance with clause 10 aforesaid.

In other words, the judgment-debtors could not be permitted to render nugatory all their obligations under the prior part of the contract, whenever it suited their pockets to do so. Payment of damages by them under clause 10 would not be a full and exclusive satisfaction of all obligations under the contract. "The compromise agreement is one for the non-performance of which mere payment of this sum of money would not be an adequate relief and, in spite of clause 10, the contract is otherwise proper to be specifically enforced".

Judgment of the Judicial Commissioner reversed.

Appeal (No. 4 of 1927) from a judgment of the Court of the Judicial Commissioner, Central Provinces (Baker, J. C. and Kotval, A. J. C.), dated the 24th March, 1924, dismissing an appeal from an order of the District Judge, Nagpore, dated the 5th November, 1923, rejecting the appellants' application for execution of a decree of the District Judge, Nagpore, made on the compromise of a suit between the parties and dated the 28th February, 1922.

As the appeal to His Majesty in Council turned on the construction of the said compromise decree, the relevant passages are quoted here in full:—

*P. C. Appeal No. 4 of 1927. 24th November, 1927.

P. C.
Sir Bissessar Das Daga v. Emmanuel Vas.

By clause 2 the defendants "are restrained from selling the ore from their mines mentioned in the agreement, dated 1st March, 1916, or mortgaging, or otherwise alienating their mines or any interest therein, or the ore thereof, except the excess quantity specifically allowed to be sold under clause (8) of this decree, until they have delivered the whole of the balance of 31,234 tons of ore containing 48 per cent. of metallic manganese, which has remained to be delivered to the plaintiffs and which they agree and are hereby ordered to deliver in the following manner and subject to the following conditions".

Clause (3) deals with the delivery of 4,000 tons of ore per annum during the years beginning on the 15th February, 1922, and ending on the 14th February, 1929, and of 3,234 tons during the year 15th February, 1929 to 14th February, 1930.

Clause (4) provides that the ore should not contain less than 46 per cent. metallic manganese.

Clauses (5), (6) and (7) refer to the manner in which the ore has to be tendered, analysed, weighed and paid for, and lays down that disputes regarding the analysis shall not excuse the defendants from delivering the full quantity of ore of stipulated grade in the course of the year.

Clause (8) allows the defendants to sell any surplus quantity of ore in any year after delivery of the full quantity of 4,000 tons to the plaintiffs.

Clause (9) refers to payments, the price being Rs. 8 per ton of 48 per cent. of metallic manganese ore with a reduction of 8 annas per unit in the event of falling below that standard.

Clause (10) is the most important clause for the purpose of the present appeal and must be given in full. It recites:

"That in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year, or violating any of the conditions of this compromise, the defendants shall pay to the plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree".

Lowndes, K. C. and *Pritt, K. C.* for appellants.

Raikes for respondents.

Lowndes, K. C. referred to *National Provincial Bank of England* v. *Marshall* (1).

1. (1888) 40 Ch. D. 112.

P. C.

Sir Bissessar Das Daga v. Emmanuel Vas.

Lord Sumner :—Can we import all the doctrines of Equity in India?

Lowndes read from the judgment in *National Provincial Bank of England* v. *Marshall* (1) and argued that the doctrines of the English Courts of Equity are applicable to India. The Courts there are Courts of Equity and are directed to act according to equity, justice and good conscience.

Lord Sinha :—It is purely a question of construction of the compromise decree in the present case.

Lowndes cited S. 20, Specific Relief Act,

"A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

The principle underlying that section is also applicable here.

24th November, 1927. Their Lordships' Judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER :—On the 5th November, 1923, two applications came on for hearing before the Additional District Judge of Nagpur in execution proceedings taken in Suit No. 4 of 1921. The first in date was that of the present respondents, defendants and judgment-debtors in the suit, for leave to deposit Rs. 28,649-2-9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The other was that of the decree-holders for execution of their decree by seizure and delivery to them of certain manganese ore, alleged to be lying at several mines and railway sidings, and by the appointment of a receiver and other relief. The respondents, having got wind of the appellants' intention to apply to the Court, lodged their application first, but nothing turns on this. The learned Judge, holding that under the decree the judgment-debtors were entitled to take the course proposed, granted their application and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment-debtors, and his determination was affirmed on appeal by the Court of the Judicial Commissioner of the Central Provinces. The case now comes to their Lordships' Board on the construction of the decree in question and particularly of clause 10, which is as follows:—

"10. That in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year

1. (1888) 40 Ch. D. 112.

or violating any of the conditions of this compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree."

On the 1st March, 1916, the respondents, a syndicate possessed of and working manganese mines and dealing in the ore produced there, had contracted with K. Ettlinger & Co., of London, for the purchase of 38,000 tons of their manganese ore by instalments over an extended period. The contract contained provisions to secure to the buyers the exclusive supply of the sellers' ore till the contract quantity had been worked out. At the end of the year the benefit of this contract was assigned to the present appellants by the Official Liquidator under the war legislation applicable, and deliveries of ore under it and payments for purposes connected with it were made for some time. In 1921 the buyers commenced the suit, No. 4 of 1921, above mentioned, alleging deliveries of ore by the defendants to third parties in breach of the contract to the extent of over 1,000 tons and claiming a mandatory injunction and other relief. The defendants in their written statement alleged that the contract was all along wholly void as constituting a trading with the enemy; that the assignment of it was invalid; that their deliveries of ore to third parties were justifiable on various grounds; and that the appellants on their side were guilty of numerous breaches of contract.

The suit proceeded as far as the formulation of the issues, but they were never tried. The parties arrived at an agreement of compromise, and the terms, with one variation, which their Lordships agree with the Judicial Commissioner's Court in thinking immaterial for present purposes, were embodied in the compromise decree of the 28th February, 1922, out of which the execution proceedings now in question arose. It is entitled in the suit; it recites that "this suit coming on this day for final disposal.... it is hereby ordered and decreed in terms of the compromise arrived at between the parties and sanctioned by the Court," and it then sets out the agreed clauses. The second of these restrains the defendants from selling ore from the mines mentioned in the agreement of the 1st March, 1916, or alienating the mines themselves (except as provided in clause 8), till they have delivered the whole remaining balance of 31,234 tons. The third provides for deliveries at the rate of 4,000 tons per year for seven successive years

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ending in February, 1929, with a balance delivery of 3,234 tons in the next and final year. Then follow provisions for the quality of the ore to be delivered and for determination of that quality by analysis; for tender of each lot in writing, with particulars of the mine of origin and the place of delivery, each lot not being less than 500 tons, with liberty to the defendants in case they raise more than 4,000 tons in one year to sell the surplus to third parties, giving notice of the same with full particulars to the plaintiffs. Clause 9 fixes the price payable by the plaintiffs at Rs. 8 per ton. Then follows clause 10 quoted above. The general tenor of this agreed decree shows that, like the original agreement on which it is founded, the parties had in contemplation the execution and completion of this contract by actual deliveries in annual instalments, the performance being secured by the present grant of an injunction preventing the defendants from finding any alternative market for their ore.

Seventeen months later the decree-holders filed their application for execution, alleging that the first 4,000 tons had been short-delivered by about 1,240 tons, and that only 60 tons more had been delivered in the first half of the second year. In the judgment-debtors' statement in reply to the application the substantial correctness of these figures is admitted with the additional allegation that their best efforts had not enabled them to deliver any more. It also mentions, what was no doubt a material factor in the dispute, that "price of the manganese has at present gone very high," and in their judgment of the 24th March, 1924, the Judicial Commissioner's Court mention that the price was then, as they were informed, about Rs. 25. It may accordingly be taken that the business object of the compromise was to get the supply of ore at Rs. 8 continued for years to come, and the business object of the breach was to put an early stop to so ruinous a loss by bringing the contract to an end. The question is whether clause 10 permitted this to be done.

The appellants point out that this clause provides for liquidated damages and that without it the decree would only be capable of execution by enforcing the injunction. In order to ascertain the sum, for which execution should go, it would be necessary to bring a suit or suits to have the damages ascertained. Clause 10 is therefore a clause in the decree-holder's favour in the first instance. Though by saving time and costs it may really benefit the debtor as well in the long run,

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it is not framed as a clause mainly intended for the debtor's convenience. In a sense it is an option to the buyer, for, if he does not choose to seek an order for delivery of specific ore, he is able to ask for execution as of a judgment for a calculable sum of money, but in no sense can it be construed as an option to the seller, when it no longer suits him to go on with the contract, to buy back at an advance of only Re. 1 per ton the whole of the undelivered portion of the contract. Why restrain the judgment-debtors from delivering their ore to third parties, if in effect they can do so at will on merely paying the agreed forfeit? This virtually makes cl. 2 inoperative. It would be a strange result of a compromise, aiming at the continuance of deliveries, to authorise the seller to repudiate his obligations and, taking advantage of his own wrong, to end the matter at his own selected moment by a pre-arranged payment, which might not be an adequate compensation at all.

The argument for the respondents and the reasoning, on which both Courts below proceeded, is the same. All the clauses of the decree are indeed to be read together, but clause 10 controls clause 2. Payment of sums calculated in accordance with clause 10, if the seller chooses to make it, will be a sufficient compliance with the whole decree and, in spite of non-delivery of by far the greater part of the deliverable quantity, no further relief will be available to the decree-holders. The clause contains no words limiting the case provided for to failures arising from causes beyond the sellers' control, but it does say that the provision as regards the damages "shall" operate on the defendants' violating any of the conditions of the compromise and it must be enforced as it stands. Among the principal conditions are the sellers' obligation not to deliver to third parties, an act from which they consented to be restrained, but, if they delivered to others in violation of this restriction as the Court plainly understood that they had done, it was also in violation of the conditions of the contract, and would only result in bringing into play the penalty named in clause 10. The learned Judges recognised that this construction rendered nugatory the stipulated restraint upon selling elsewhere, and enabled the defendants to escape the consequences of a wilful breach of contract, consisting in the withholding from the decree-holders of ore actually in their possession and capable of being delivered to the plaintiffs, by simply paying Re. 1 per ton as liquidated damages. Why the decree should begin by forbidding delivery

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to third parties except in a named case under clause 8, and then end by giving permission to do so to any extent in case a different event happened under clause 10, is not explained or explicable.

It must be borne in mind that there are two distinct breaches, for which the decree provides. There is delivery of ore to third parties, except as authorised by clause 8, for which an appropriate relief is an injunction, and there is failure to deliver the agreed quantities to the decree-holders, for which damages, liquidated or not, will be the proper remedy. Their Lordships do not think that they are constrained to a construction of clause 10, which will enable the judgment-debtors to render nugatory all their obligations under the prior part of the contract, whenever it suits their pockets to do so. Clause 10 provides that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it does not say that such payment is to be a full and exclusive satisfaction of all obligations under the contract. The payment into Court does not make the decree a satisfied decree. It provides a mode of enforcing such payment—"the same shall be recovered by execution of this decree"—but it does not say that the other terms shall not be enforced by execution of the decree, namely, by applying to the Court to enforce the injunction. The sellers have to show some cause in argument why they should not obey the injunction to which they have consented. They cannot do so merely by pointing to a clause, which provides an alternative remedy, under which they "shall" pay so much by way of liquidated damages, if a money payment is sought at all. Reading the contract as a whole and taking all its terms together is a very different thing from reading it so that its final clause defeats the whole object of the agreement. Such a meaning even the debtors never could have intended unless they deliberately proposed to lay a trap for the decree-holders. As the clause stands it provides a remedy for the decree-holders without stipulating for the debtors any corresponding discharge of the injunction. It does not even cover all the possible events, in which the contract might be broken, for, if before the time had arrived for any performance at all, the judgment-debtors had announced that they would never perform it in any respect, this would have been an anticipatory breach, for which unliquidated damages would be recoverable if the decree-holders chose so to treat it, but, not being a breach of any of the conditions, that is the expressed

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conditions, it would be outside of clause 10. On the other hand, an unintentional failure to satisfy all the requirements of clause 5 would be as much a violation of a condition as a deliberate diversion of the ore to other buyers and failure to deliver the full or any quantity to the decree-holders, and, on the respondents' contention, would equally imperatively require payment of the expressed forfeit, clause 2 notwithstanding. The chapter of accidents equally with the deliberate pursuit of gain might thus bring the whole scheme to an end at the outset before any ore had been delivered, or again, by a combination of luck and care the sellers might keep the contract going till it became profitable to them to break it, and then bring it to an end whenever they pleased. This is not giving to a business contract a construction that will give it the efficacy which the parties must have intended at the outset. The compromise agreement is one for the non-performance of which mere payment of this sum of money would not be an adequate relief and, in spite of clause 10, the contract is otherwise proper to be specifically enforced. Accordingly their Lordships think that this appeal succeeds.

In the view which they took of the construction the Courts below rightly refrained from expressing any opinion as to the relief, which might be proper, if the contrary construction were adopted or as to the extent to which a remedy under clause 10 would be available to the decree-holders concurrently with other appropriate remedies in the circumstances. These and similar questions remain to be determined by the Court, which will dispose of the decree-holders' application. The proper course will be to declare, that clause 10 of the compromise decree of 28th February, 1922, does not, on a true construction, afford to the judgment-debtors any answer to the petition for execution of it, presented by the decree-holders ; to allow the appeal of the decree-holders with costs here and below ; to set aside the decisions of both Courts in favour of the judgment-debtors, and to remit the application of the decree-holders to the Court of the District Judge of Nagpur to be dealt with, in accordance with the above declaration and otherwise as may be right, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Lattey & Dawe.*

Solicitors for respondents : *Watkins & Hunter.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—LORD CHANCELLOR, LORD CARSON AND LORD DARLING.

Sukdevdoss Ramprasad ... *Appellant** (*Plaintiff*)

v.

Diwan Bahadur Govindoss Chathurbhujadoss and Company ... *Respondents* (*Defendants*).

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Indian Contract Act, 1872, S. 30—Wagering contracts——Contract for sale and purchase of goods—Speculation not equivalent to wagering—Contract contemplating payment of differences only—Patta patti.

The mere fact that a contract for sale and purchase of goods is of a highly speculative character cannot alone vitiate the transaction as a wagering contract within the meaning of S. 30 of the Indian Contract Act, 1872. To produce that result there must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded, but that differences only should become payable. Where no such definite agreement or understanding was proved, and it appeared that delivery of the goods might always have been insisted on, the Judicial Committee held (differing from the Court of Appeal in India) that the contract was not bad on the ground of wagering, notwithstanding that it would have been considered bad form, among the parties (merchants of Madras), to have made such a demand for delivery.

Their Lordships of the Privy Council concurred in the view of the law expressed by the learned Trial Judge (Mr. Justice Coutts-Trotter) that "you must not only have a state of things in which both parties contemplate that delivery would not in fact be likely to be demanded, but you must have a definite agreement that delivery could not in any event be demanded without a breach of the understanding between the parties".

The incidents of *patta patti* considered.

Judgment of the High Court affirmed on other grounds.

Appeal (No. 107 of 1926) from an appellate decree of the High Court, Madras (Kumaraswami Sastri and Krishnan, JJ.), dated the 29th April, 1925, which varied a decree of the same Court on the Original Side made by Mr. Justice Coutts-Trotter on the 4th October, 1923.

The material facts are given in their Lordships' judgment and also in the judgments of Kumaraswami Sastri and Krishnan, JJ., in the Court of Appeal (reported in 93 I. C. 169), where all the relevant authorities are cited and elaborately discussed.

As the Privy Council approve of the reasoning of the learned Trial Judge, and the question is one of far-reaching

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*P C Appeal No. 107 of 1926. 17th November, 1927.

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importance, Coutts-Trotter, J.'s judgment is reproduced below *verbatim*:—

"The plaintiffs' case on the face of their plaint is simply a claim for the price of goods sold and delivered. It is not contended that the actual goods were delivered. It is admitted that documents purporting to be delivery orders on which delivery of the goods could be demanded passed between the parties The defence is a somewhat unusual one, namely, that the transactions were not really sales of goods at all, but were in the nature of gaming and wagering. The only thing that I find in the evidence in support of that contention is the fact that the goods after passing from the plaintiffs to the defendants and going through other hands ultimately reverted by purchase to the plaintiffs. That is obviously not conclusive. A buyer may sell with the knowledge that the person to whom he sells will pass on the goods, and if the market is rapid and transfers take place quickly he may very well contemplate that the person who ultimately claims the goods may be the last of a long chain of buyers, and if the market were against him when he is called upon to deliver he might well think it to be the wisest course to buy back the goods at the end of the circle and wait for an advance in the market price. Thus it may happen that a perfectly legitimate series of transactions take place without the goods having physically left his possession and it may well be that the state of the market was such that the documents of title to the goods, in this case called *patta pattis*, changed hands so rapidly that the seller in each particular case may have thought it extremely improbable that he would ever be called upon to give delivery to his immediate buyer. As I understand the law as laid down in the leading English cases and it is obvious that the defence in this case is based upon those cases—that is not enough; you must not only have a state of things in which both parties contemplate that delivery would not in fact be likely to be demanded, but you must have a definite agreement that delivery could not in any event be demanded without a breach of the understanding between the parties. The defendants' own witnesses negative the supposition that such an understanding existed here. They all agree that they would have been compelled to take, or entitled to ask for, delivery, as the case may be, unless and until they had passed a *patta patti*, which is in fact a document of title to the goods, to their sub-purchaser. That being the defendants' evidence, I think their case fails on their own showing, and that however much one may suspect that the speculative element entered into these transactions, as no doubt it did, that suspicion cannot translate itself into a determination that these were gaming transactions. If the merchants of Madras desire to enter upon the dangerous and slippery path of gambling in differences and at the same time reserve to themselves the right of setting up that not over-honest defence, they must learn its technique a little better than they have done in this case. My judgment is that the goods were sold, that the transfer of *patta pattis* was in fact a delivery, and that the plaintiffs must have a decree for the amount claimed with costs and interest at 6 per cent. till payment. The defendants of course will have their remedy over against the persons who bought on the same terms from them."

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Stuart Bevan, K. C. and *K. Brown* for appellant.

A. T. Miller, K. C. and *Narasimham* for respondents.

17th November, 1927. Their Lordships' Judgment was delivered by

LORD DARLING :—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 29th April, 1925, varying a decree of the same Court on the Original Side made by Mr. Justice Coutts-Trotter on the 4th October, 1923.

In the original suit the plaintiffs (the present appellants) claimed the sum of Rs. 65,255, the price of goods sold and delivered by the appellants to the respondents.

In answer to this claim, the respondents pleaded as follows:

"The plaintiffs, defendants and certain other merchants formed a group, and it was agreed by and between the merchants of the group that the transactions had among them should take place on the footing that no deliveries should be intended or asked for, that *patta pattis* or delivery orders should be issued to the respective purchasers, that after the delivery orders were sent round and the same ultimately reached the hands of the original vendors, the *patta pattis* should be exchanged and hawala chits issued, that accounts should be taken thereafter on the footing of the exchange of *patta pattis* or delivery orders, and that the respective vendors should be entitled to the difference in prices from the respective purchasers."

The respondents also pleaded that there was no actual delivery of the goods of which the price was sued for, that appellants never were in a position to deliver them, and that it never was intended that delivery should take place. The respondents further pleaded that the contracts were void as being wagering contracts for the payment of differences only.

It was proved or conceded that as regards the goods in question no delivery took place, but that documents purporting to be delivery orders were made which passed through several hands, and that within one week all the goods—so far as any ever existed—were in the hands of the appellants, which, indeed, they had never left.

This resulted from the fact that in respect to each re-sale what is described as *patta patti* was made—a process which resulted in differences merely, according to the fluctuations of the market, being recoverable, instead of the goods or their price.

The trial Judge held that the documents which purported to be orders for delivery were so in fact, and were equivalent to delivery of the goods themselves. He rejected the contention that these dealings were wagering contracts merely, and he gave

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judgment in favour of the appellants for Rs. 65,255 and interest. This judgment was set aside by the Court of Appeal, the Judges holding that the contracts were entirely wagering ones incapable of giving any right of action. Judgment in regard to them was therefore entered for respondents.

To succeed in this action for the price of goods it is necessary for appellants to prove that the goods were actually delivered—and this was never contended—or else that some document of title was given to the respondents which would oblige the custodian of the goods to hand them over to the holder of it.

On the Madras market were several merchants who bought and sold amongst themselves such goods as those to which this suit relates—and it was proved that the very goods here in question had first been sold by the appellants to the respondents. No delivery of the goods was then made, but they were sold by the respondents, and resold by the purchasers again and again—no delivery of goods ever being made—until at last the goods were re-purchased by the appellants themselves, who now claim against the respondents the full price, as for goods sold and delivered.

It was proved that whenever one of these particular sales was made a document was given to the purchaser. Many of these documents were exhibited in this case, notably the one now to be set out.

EXHIBIT III.

Delivery order given to Govindoss Chathurbujadoss.

No. 784. Dated 27—11—1922.

Delivery order.

Sukdevdoss Ramprasad,

Bankers, Importers, Yarn Merchants and Commission Agents,

101, Mint Street, Georgetown, Madras.

To

Govindoss Chathurbujadoss.

Description.	Bales.	Bundles.
No. 40s Japan.	25	1,000
November voida.		

Received 25 bales of 40s Japan *patta patti* with M. Amritlal.

(Signed) TRIMBAKLAL,
for B. G. C & Co.
27—11—1922.

It will be observed that this document is headed "delivery order"—and for the appellants it was contended that this entitled the holder of it to demand the actual delivery of the goods.

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But it was replied that, however that might have been originally, the words "received 25 bales of 40s Japan *patta patti* with M. Amritlal" showed that it is not now a document of title giving its holder a right to demand delivery of the goods, but simply a link in a chain or series of notes showing that no actual transfer of goods was contemplated, but merely a final payment of differences resulting from the making—and non-performance—of a number of contracts of sale.

A good deal of evidence was given as to the meaning of the words "*patta patti* with," and it appears certain that when once *patta patti* is made the buyer has no longer a right to demand the goods themselves, nor is the seller obliged to deliver them, but the matter should be settled by the payment and acceptance of the difference resulting from the sale and re-sale of the goods.

This being so, it was contended on behalf of the respondents that the contract in question was a wagering contract. There can be no doubt that these various contracts were in character highly speculative; but, as was pointed out by the trial Judge and by the Judges on appeal, that is insufficient in itself to render them void as wagering contracts. The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable.

Now, in the present case no such definite agreement or understanding was proved; in some instances of other sales between these parties there was no *patta patti* and delivery was given and taken, and so here, unless and until *patta patti* was made, delivery might always have been insisted on. There can be little doubt, however, that to have made such a demand would, among these merchants, have been considered bad form. Gamblers have their own code of honour, and expect its observance, although they cannot ensure it; and we know that "even the wild outlaw in his forest walk keeps yet some touch of civil government." But the law does not affect to enforce mere courtesies.

The trial Judge held that notwithstanding the fact that *patta patti* had been made or agreed in the contracts relating to these goods, the appellants were still entitled to recover the price of them, since the documents which passed between the parties were valid delivery orders on presentation of which the

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goods might be demanded. This was evidently not the view taken by the Judges in the Court of Appeal; but they did not go at length into this matter, because they held that the contracts represented nothing but wagering transactions—and therefore gave the appellants no rights whatever.

In the opinion of their Lordships the contracts relied on were not bad on the ground of wagering, and that for the reasons given by the trial Judge. They therefore do not concur in the judgments appealed from in so far as wagering is concerned. But from those judgments it appears that the Judges of the Court of Appeal were prepared to hold that the appellants were not in a position to deliver the goods they had sold, and also that the respondents had not agreed to accept what are called delivery orders, directed to third persons, as something equivalent to delivery so as to exonerate the appellants from liability to deliver the goods, and to entitle them to sue for the price.

In the opinion of their Lordships this view is correct. The making of *patta patti* resulted in an agreement that the obligation to deliver the goods should not remain effective, that the price of them should neither be demanded nor paid, but merely the resulting differences. These differences have been paid or tendered and nothing is due in regard to them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, with costs, including those of the petition by the appellants for the admission of further documents which is also dismissed.

Solicitors for appellant : *Pugh & Co.*

Solicitor for respondents : *H. S. L. Polak.*

K. J. R. *Appeal dismissed.*

Reporter's Note :—As regards *Teji Mandi* transactions, *see* 47 Bom. 263 : 68 I C 481 : 24 Bom. L R 812 and 26 Bom. L R 1097 : 85 I C 613, the decision in the latter case being upheld by the Privy Council in 28 Bom. L R 1376 : 98 I C 338 : 51 M L J 809 where analogous cases are considered —*K. J. R.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice* AND MR. JUSTICE REILLY.

Maneckji Rustomji ... *Appellant** *(Defendant)*

v.

H. H. Wadia and others ... *Respondents (Plaintiffs)*.

Maneckji Rustomji v. Wadia.

Letters Patent, cl. 15—Judgment—Official Referee—Report of—Order referring back, to him for further consideration—Appeal from.

An order referring back a report to the Official Referee for further consideration is not a judgment within the meaning of clause 15 of the Letters Patent, and no appeal lies against it.

By passing such an order the Judge declines to pass judgment at that stage and postpones it to a future date.

On appeal from the order of the Hon'ble Mr. Justice Beasley, dated 6th April, 1927, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 73 of 1918.

K. S. Krishnaswami Aiyangar for appellant.

S. Doraiswami Aiyar for respondents.

The Court delivered the following

Sir William Phillips, O. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—A preliminary objection is taken to this appeal that no appeal lies because the order appealed against is not a judgment within the meaning of clause 15 of the Letters Patent. This question was considered by a Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (1) and it was there laid down that the test to be applied in deciding whether an order is or is not a judgment within the meaning of clause 15 is as follows:—

"If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause".

The present order is an order referring back a report of the Official Referee for further consideration and it is contended that the report of an Official Referee is a final order determining the rights of the parties. Mr. Krishnaswami Aiyangar, however, had to concede that a Judge is not precluded from varying or discharging such report and that it cannot take effect until it has received his *imprimatur.* It was then argued tha.

*C M P No. 3254 of 1927. 28th September, 1927.
(O. S. Appeal No. 46 of 1927) .

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

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the Judge could only alter the report if objections were taken in the manner prescribed in the rules of this Court. Rule 12 of O. 23 distinctly lays down that at the hearing upon a report the Court may at once proceed to give judgment in the case or may make such order as it thinks fit. There is nothing in this rule which would imply that the Court can only hear this report when objection has been taken to it; it stands to reason that when the report is submitted the Court is bound to hear it and to decide whether it shall act in accordance therewith or not whether the parties file objections or not. Until therefore such decision has been arrived at, the report cannot be deemed a final order, for it only receives authoritative power by the order of Court.

The only other argument adduced was with reference to the case in *Howard* v. *Wilson* (2) which is referred to by Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (1) expressing his agreement therewith. That decision related to an order refusing to confirm an award. It has since then been dissented from both in Calcutta and in this Court; but, even apart from that, an award can hardly be said to stand in the same position as the report of an Official Referee. An award is an adjudication by arbitrators who have the power of giving a quasi-judicial decision. The Official Referee has no such power and consequently his report stands on a very much lower footing than an award. In the present case undoubtedly the order of the learned Judge does not put an end to the suit before him, for it will have to come up again on a fresh report from the Official Referee. He will then proceed to deal with it and pass final orders. No such final order having been passed, this appeal does not lie and must be dismissed with costs.

Reilly, J.

Reilly, J. :—Mr. Krishnaswami Aiyangar has tried to persuade us that the combined effect of R. 1 of O. 24 and Rules 11, 12 and 13 of O. 23 of the Original Side Rules is that, when the Official Referee submits his report in any matter, if no objection is raised by any party, the Judge is bound to accept the report, even though there is in it the most glaring mistake or omission which jumps to the eye at the first glance. The rules themselves do not say explicitly that the Judge must accept the Official Referee's report in such circumstances, and I find it very difficult to believe that, if it had been the intention

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1878) I L R 4 C 231.

Maneckji Rustomji v. Wadia.

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so to tie the Judge's hands, it would not have been stated in the clearest and plainest manner. To my mind there is no such implication in the rules; and, if there were, if through some oversight the Court had by implication put itself in the power of one of its subordinates bound hand and foot, then I think it would be a matter calling for immediate amendment.

But let us suppose that the Official Referee has submitted a report in a suit and the Judge has accepted it either on consideration or, as Mr. Krishnaswami Aiyangar has suggested, on compulsion. What is the result? Under R. 13 of O. 23 the report will then be conclusive evidence of the facts stated in it. But evidence, even the most conclusive evidence which governs the result of a suit, is not a judgment. If the Judge accepts the report, he accepts the evidence, and he then has to apply it to the issues between the parties and pronounce judgment. If he does not accept the report but refers the matter back to the Official Referee, that is, he declines to pass judgment at that stage and postpones it to a future date, how can we say that he has pronounced judgment within the meaning of clause 15 of the Letters Patent as interpreted by the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (1). We might almost as reasonably say that an order of adjournment is a judgment within the meaning of that clause.

I agree that this appeal is incompetent and must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Batcha Chinna Venkatrayudu and others ... *Petitioners** (*Petitioners*)

v.

The Maharaja of Pithapuram and others ... *Respondents* (*Respondents*).

Venkatrayudu v. The Maharaja of Pithapuram.

Madras Estates Land Act—Execution proceedings under—Civil Procedure Code, O. 21, R. 58—Applicability of, to such proceedings.

O. 21, R. 58, Civil Procedure Code applies to execution proceedings under the Madras Estates Land Act, and an application under that rule can be made to the Revenue Court.

*C. R. P. No. 308 of 1926. 19th October, 1927.

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

Venkatrayudu v. The Maharaja of Pithapuram.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Revenue Divisional Officer at Cocanada, dated 4th September, 1925, and passed in E. P. No. 113 of 1924.

K. Kameswara Rao for petitioners.

A. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the Revenue Divisional Officer of Cocanada dismissing the claim petition of the petitioner. The Divisional Officer held that O. 21, R. 58, C.P.C., does not apply to execution proceedings under the Estates Land Act. Under S. 192 the provisions of the Code of Civil Procedure are made applicable excepting a few to proceedings under the Estates Land Act, and there is no express provision which exempts O. 21 from applying to proceedings in execution of rent decrees. In the absence of specific provisions to the effect that a claim petition is not to be entertained by a Revenue Court I am not prepared to hold that an application under O. 21, R. 58 cannot be made to the Revenue Court. It is not contended for the respondent that the rent decree in this case is in the nature of a mortgage decree. No doubt a claim petition is not competent when a mortgage decree is being executed.

The petitioner had a mortgage right over the holding before the passing of the Estates Land Act, and any right acquired before the passing of the Estates Land Act in the holding is saved by S. 125 of the Act. The petitioner filed a suit in 1907 on two mortgages and obtained a decree before the passing of the Act, and he therefore had the mortgagee's right on the date of the application over the property which was sought to be put up for sale. It is suggested on behalf of the respondent that the petitioner became the owner of the equity of redemption before the decree in favour of the respondent in 1919 and therefore he being the owner of the holding the landlord was entitled to bring it to sale. That question would depend on the question whether the petitioner became the owner by purchase in Court and as that matter has not been investigated, it is not possible to express any opinion on the point. I therefore set aside the order of the Divisional Officer and direct him to restore the claim petition to file and

Venkatrayudu v. The Maharaja of Pithapuram.

dispose of it according to law. Costs of this application to abide the result.

A. S. V. *Order reversed and claim petition remitted*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

P. Rama Aiyar ... *Appellant** (*1st Defendant*)

v.

T. R. Sivagnanam Pillai and others ... *Respondents* (*Plaintiffs 1, 2 and 2nd defendant and additional Respondents*).

Rama Aiyar v. Sivagnanam Pillai.

Religious Endowment—Temple committee—Notice of meeting—Sufficiency of notice—Notice stating that affairs of temple would be considered—Appointment of additional trustees at the meeting—Validity.

Where a temple committee convened a meeting after giving notice to the members of the committee which stated that the affairs of the temple would also be taken into consideration at the meeting along with the other subjects fixed, and some of the members of the committee attended the meeting and appointed two additional trustees,

Held, that the notice given was not a proper and sufficient notice inasmuch as it did not state specifically that the appointment of additional trustees was a subject which would be taken into consideration at the meeting and, consequently, the appointment of the additional trustees was invalid.

Young v. *Ladies' Imperial Club*, (1920) 2 K B 523 referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin, dated 5th May, 1923, in O. S. No. 39 of 1922.

T. M. Ramaswami Aiyar for appellant.

A. Krishnaswami Aiyar for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—This appeal arises out of a suit filed by two of the trustees of Sree Sankaranarayanaswami Temple at Sankaranainar Koil for a declaration that the appointment by the Temple Committee of the two additional trustees is invalid. The ground on which the Subordinate Judge decreed the plaintiff's suit was that proper notice of the subject before the meeting, which eventually appointed the additional trustees, was not given to the members of the temple committee. They were not informed that at that meeting

*Appeal No. 391 of 1923. 3rd January, 1927.

they were going to consider the question of the dismissal of one trustee and appoint two other additional trustees, and consequently the appointment was invalid. There were seven members of the temple committee and at the meeting in question when the additional trustees were appointed only three were present, and these gentlemen appointed the appellant and another as additional trustees. It is conceded that the temple committee has power to appoint additional trustees. Both the plaintiff's 2nd and 3rd witnesses admit this power and it is not questioned before us. The only question is whether a proper notice convening the meeting was given to the members of the temple committee that at that particular meeting to be held this subject was going to be taken, namely, the appointment of the two additional trustees. There is no doubt that if in the agenda before the meeting this subject was mentioned there could be no valid objection by the other members of the temple committee to the proceedings of the meeting and the appointment of additional trustees. The notices of the meeting are Exs. L & M. Ex. M, dated 23rd December, 1920, is a notice calling for a special meeting on the 28th December, 1920 at 2 P.M. All that is said in Ex.M is that the meeting will be held for the two matters which were mentioned there (not relating to the temple) and also to dispose of the subjects which were left undisposed of in the previous meeting. Ex. L is dated the 16th December, 1920 and the notice is as follows:

> "I beg to inform you that in addition to the papers referred to in the *arzi* sent yesterday fixing the usual meeting for the 18th and 19th instants the papers connected with the reference in respect of Sankaralinga-swami Koil in Casba Sankaranainar Koil are included among the subjects as per resolution prior to the said meeting."

As seen above Ex. M does not as regards this temple say anything more than that the subjects left undisposed of in the previous meeting would be taken into consideration. The question is whether Ex. L is a sufficient notice that at a meeting of the temple committee new additional trustees are to be appointed? Before dealing with this question it is necessary to refer to some facts which took place before.

It appears there were three trustees to this temple and one of them was N. A. V. Somasundaram Pillai, a vakil of the Tinnevelly Court. There was disagreement between him and the first trustee. The second trustee sometimes sided N. A. V. Somasundaram Pillai and sometimes sided the other. Further it is alleged that N. A. V. Somasundaram

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Kumaraswami Sastri, J.

Pillai was acting high-handedly and was in possession of more than a lakh and sixty thousand rupees and did not account for the same to the committee in spite of repeated notices. The temple committee tried to get the accounts from him but could not succeed and the President of the Committee requested one Nelliappa Pillai to go into the matter fully and submit a report. He submitted a report Ex. N-1, in which he said that there was disagreement between the trustees and that though there was no misappropriation by N. A. V. Somasundaram Pillai it was impossible for the trustees to get on amicably and finally suggested that additional trustees might be appointed. In addition to this there were Mahazars sent by a Sabha formed to protect the interests of this temple which suggested the appointment of additional trustees and Ex. XIV is one such Mahazar, dated the 25th December, 1920, and this suggested the name of the appellant as the fit person to be appointed as a trustee. The position as appeared from Exs. J, XIII, K-1, N; X-I, WW, N-1, and XIV was that the temple committee found the affairs of this temple in a very unsatisfactory state. Large amounts were spent for repairs for which there was no proper account kept and attempts to get the correct accounts proved ineffective. Further there were complaints made by the worshippers that the temple affairs were not properly managed and there was the suggestion of Nelliappa Pillai that additional trustees should be appointed. The fact that the temple affairs were in a very unsatisfactory state seems to have been conceded by everybody but the cause of it was not ascertained or fixed and the remedy was not clearly suggested until we come to Ex. N-1, the report of Nelliappa Pillai. Ex. L speaks of the papers connected with the reference in respect of Sankaralingaswami Koil, and what that means is spoken to by defendants' 1st witness. He says that referred papers according to him meant the papers referred to the members of the committee for opinion. According to the 1st witness for the plaintiff by 'refer case' he understood the papers relating to the conduct of N. A. V. Somasundaram Pillai. So far as we can see Ex. L generally says that all the papers connected with the reference in respect of Sankaralingaswami Koil are included among the subjects. It does not state specifically what subjects are going to be discussed at that meeting nor does it in any way suggest that new additional trustees are going to be appointed. The evidence on the side of the plaintiffs is that the members of the Committee did not think or had no reason to believe that at that meeting additional

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trustees were going to be appointed. Ex. L by itself gives no indication of the fact that additional trustees are going to be appointed. All that it says is that the affairs of the temple will be taken into consideration at that meeting. We do not think that that is a sufficient notice for the appointment of additional trustees. It is argued by the learned vakil for the appellant that no notice of the subjects to be taken at the committee is necessary in the case of temple committees and he bases his argument on the ground that the temple committee is a special body and has powers to dispose of the work before it irrespective of any notice or anything of such a nature. He says that the present case is analogous to proceedings by Directors of Companies and cites the decision in *Rex* v. *Pulsford* (1) which was approved and followed in *La Compagnie de Mayville* v. *Whitley* (2). The decision in *La Compagnie de Mayville* v. *Whitley* (2) is to the effect that in the case of a company it is not necessary in the notice convening the meeting of the directors to state what the business to be transacted at that meeting is to be. Lindley, L. J., observes at p. 797 as follows :—"The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do it; but it strikes me, as it struck Lord Tenterden in *Rex* v. *Pulsford* (1), that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation. It is not uncommon for directors conducting a company's business to meet on stated days without any previous notice being given either of the day or of what they are going to do. Being paid for their services—as they generally are, and as is the case in this company—it is their duty to go when there is any business to be done, and to attend to that business whatever it is ; and I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies." Then he refers to *Rex* v. *Pulsford* (1) and the observation of Lord Tenterden in

1. (1828) 8 B & C 350 : 108 E R 1073. 2. (1896) 1 Ch. 788.

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that case. Reference is also made by the learned vakil for the appellant to *Rasa Sahib Shamsul Ulama* v. *Hasan Ali Sahib* (3) where the question was as to the election of a Mutawalli. Justice Seshagiri Aiyar was of opinion that there was a distinction to be drawn between a committee consisting of a definite number and a body composed of indefinite number of persons, the distinction being in the first case the number of the select body is fixed and in the other case the number of members is subject to fluctuation. The observation of the learned Judge hardly covers a case like the present. A body is not necessarily a select body because its members are fixed; to bring the case within the rule in *Rex* v. *Pulsford* (1) and *La Compagnie de Mayville* v. *Whitley* (2), a smaller executive body should be appointed by a larger body for the purpose of carrying on its internal management. The larger body may be fixed as much as the select body. But it does not follow that because a body is fixed it becomes a select body so as to dispose of any matter without notice of the meetings or without the subjects being mentioned in the agenda. In the case of temple committees no doubt the body is a fixed body in the sense that its members are not subject to fluctuation from time to time as in the case of an electorate but there is hardly any analogy between the directors of a bank or corporation or company the members of which are appointed by the general body of shareholders for carrying on the internal affairs and the members of a temple committee who are elected by the worshippers and appointed to supervise the affairs of the temple. We think that it will be against all principle and utterly detrimental to the proper management of temples to hold that a temple committee without any proper notice to the members of the committee can convene a meeting without giving in the notice convening it any particulars as to the business to be done at the meeting and that it can take up any question it likes without previous notice so as to make it binding upon the whole committee. To hold that an important matter like the dismissal of a trustee or the appointment of additional trustees could be disposed of without any notice to the other members of the committee would be a very dangerous proposition to be laid down. We think the present case comes within the decision in *Young* v. *Ladies' Imperial Club* (4). When a notice is required in law it is clear that

1. (1828) 8 B & C 350 : 108 E R 1073. 2. (1896) 1 Ch. 788 at 796.
3. (1916) I L R 40 M 941 : 33 M L J 348.
4. (1920) 2 K B 523.

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such notice has to give reasonable particulars as to the business to be transacted at that meeting. In this case the subject to be transacted at the meeting was stated as follows:—

"To report on and discuss the matters concerning Mrs. Young and Mrs. Lawrence"

and it was held that this notice was insufficient. It was held by Lord Sterndale, M. R., and Warrington, L. J., that this notice was insufficient. Warrington, L. J., observes:

"To my mind that notice was not sufficient notice. The meeting convened in accordance with it was not a meeting specially convened for the purpose of considering a particular thing, namely, whether or not Mrs. Young should be recommended to resign."

In the present case the appointment of additional trustees to the temple is a matter of great importance and this should not have been done without proper notice to the members of the committee. We think that the Subordinate Judge was right in holding the appointment of additional trustees as invalid as the notice of the meeting in which the appointments were made did not state that this was the subject to be taken into consideration. The appeal fails and is dismissed with costs.

As regards the memo. of objections we do not think sufficient cause is shown to interfere with the order of the Subordinate Judge as regards costs, regard being had to the unsatisfactory state of affairs in this temple.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

C. Singara Mudaliar ... *Plaintiff.**

v.

M. Govindasami Chetti and others ... *Defendants.*

Singara Mudaliar v. Govindasami Chetti.

Civil Procedure Code, O. 6, R. 17—Amendment of plaint—Suit originally filed in the City Civil Court—Transfer of suit to High Court under clause 13 of the Letters Patent (Madras)—Application for amendment of plaint—Effect of amendment to convert suit into one not cognisable by City Civil Court—Amendment, if can be granted.

Where a suit which had originally been filed in the City Civil Court was transferred to the High Court under clause 13 of the Letters Patent (Madras), an application to amend the plaint, the effect of granting which

*C. S. No. 564 of 1927. 22nd November, 1927.

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will be to convert the suit into one which the City Civil Court would have had no jurisdiction to try, cannot be granted by the High Court.

Annie Besant v. *Narayaniah,* (1914) L R 41 I. A. 314 : I L R 38 Mad. 807 : 27 M L J 30 (P. C.) referred to.

C. R. Rajagopalachari for plaintiff.

K. Varadachari and *O. P. Srinivasan* for defendants.

The Court delivered the following

JUDGMENT :—The plaintiff applies for permission to amend his plaint, but the application, in my opinion, cannot be granted. The suit was filed originally in the City Civil Court, Madras, and he applied under *cl.* 13 *of the Letters Patent* that it might be removed to, and tried by this Court, in the exercise of its extraordinary Original Civil Jurisdiction. An order, I understand, was accordingly made. The present application has been argued on the footing that the effect of the proposed amendment would be to convert the suit into one which the City Civil Court (the forum originally chosen by the plaintiff) would have no jurisdiction to try. In the circumstances, can the amendment be allowed? In *Annie Besant* v. *Narayaniah* (1) it was held that the powers of the High Court, in dealing with suits transferred under clause 13 of the Letters Patent, would be the powers which, but for the transfer, might have been exercised by the Court, from which the transfer was made. (*See* page 820). The test then is, if this amendment was applied for in the City Civil Court, could that Court have granted it? I conceive that no Court will permit a plaint to be so amended as to oust its own jurisdiction to try the suit. The powers of the High Court under clause 13 being those of the City Civil Court itself, it follows that the amendment cannot be allowed.

Another test may be applied. If the plaint in the form, which it would take after the amendment, had been filed in the City Civil Court, then that Court would have had no jurisdiction, and no order under clause 13 could have been made. It has been held under S. 25 *of the Code of Civil Procedure of* 1882 (corresponding *to S.* 24 *of the present Code*), that a transfer cannot be made from one Court to another under that provision, unless the suit has in the first instance been brought in a Court having jurisdiction; such an order if made is void. *Peary Lall* v. *Komal Kishore* (2); *Ledgard* v. *Bull* (3).

1. (1914) L R 41 I A 314 : I L R 38 M 807 : 27 M L J 30 (P C).
2. (1880) I L R 6 C 30.
3. (1886) I L R 9 All. 191 : L R 13 I A 134 (P. C).

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There is no reason to suppose that a different principle would be applied in the case of applications under clause 13 of the Letters Patent. It is therefore evident that the plaintiff having in the first instance chosen the City Civil Court as the forum, he cannot now enlarge and alter the scope of his suit, in such a way, as to render that Court incompetent to try it for want of jurisdiction.

The application is dismissed, but, in the circumstances, I make no order as to costs.

N. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

The Municipal Council, Cuddalore ... *Petitioner** *(2nd Deft.)*

v.

M. C. Krishnan Nambiar and others ... *Respondents (Plaintiff and 1st Defendant).*

The Municipal Council, Cuddalore v. Krishnan Nambiar.

Madras District Municipalities Act (V of 1920), Ss. 93 (3), 354 (2) and Schedule IV, R. 28—Person residing successively and holding appointments for more than sixty days in two Municipalities in a half-year—Levy of profession tax first by the second Municipality—Subsequent levy of tax by the first Municipality—Payment of tax to the two Municipalities—Suit for refund—Liability of the first Municipality to refund the amount of tax equal to that collected by the second Municipality—Maintainability of suit.

During the first half of a year the plaintiff successively resided and held appointments for more than sixty days within two Municipalities. Although he had rendered himself liable to pay profession tax to the first Municipality, no demand was made upon him until several months after he had left that place, and after a similar demand had been made upon him by the second Municipality. He paid the tax demanded of him by the second Municipality. Later again the first Municipality compelled him to satisfy its own demand. He thus paid profession tax twice over and brought the suit, impleading both the Municipalities as defendants, for recovery of the amount paid to either of the Municipalities.

Held, that S. 93 (3) of the Madras District Municipalities Act applied to the case and that the plaintiff was liable to pay to the first Municipality only the difference between the tax levied by that Municipality and that levied by the second Municipality, and that therefore the first Municipality must refund the amount of the tax equal to that collected by the second Municipality.

Held also that the suit was not barred either under R. 28 of Schedule IV of the Act which has reference only to an assessment which the Municipality is empowered by the Act to make, or under S. 354 (2) of the Act,

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*C. R. P. No. 1156 of 1925. 21st July, 1927.

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which has reference only to a case where the provisions of the Act have been in substance and effect complied with.

Petition under Ss. 25 of Act IX of 1887 and 107 of the Government of India Act praying the High Court to revise the decree of the Court of the District Munsif of Chidambaram in S. C. S. No. 333 of 1925.

T. S. Nataraja Pillai for petitioner.

S. R. Dikshit and *V. P. Karunakaran Nambiar* for respondents.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J. :—This is a Civil Revision Petition presented by the Cuddalore Municipal Council against the judgment of the District Munsif of Chidambaram in S.C. S. No. 333 of 1925 on his file. The plaintiff in that suit, Mr. M. C. Krishnan Nambiar, is a District Munsif, and during the first half of the year 1923-1924 he successively resided and held appointments for more than sixty days within two Municipalities—those of Cuddalore and Chidambaram. Although he had thus rendered himself liable to pay profession tax to the Cuddalore Municipality, no demand was made upon him until several months after he had left, and after a similar demand had been made upon him in Chidambaram. Eventually he paid the tax demanded of him by the latter Municipality, and later again the Cuddalore Municipality compelled him to satisfy its own demand. He thus paid profession tax twice over. In the suit in which he made both Municipalities defendants, the lower Court has decreed the refund to him by the Cuddalore Municipality of Rs. 13-2-0, being equal to the amount of the payment made to the Chidambaram Municipality. The full tax payable to the Cuddalore Municipality was a little more than Rs. 15-5-0 and he was found liable for the difference.

The point for decision thus is whether if a person who becomes successively liable in a single half-year to pay profession tax in two Municipalities pays it in the second, he acquires exemption from liability to pay it in the first. The answer depends upon the construction of Sub-section (3) of S. 93 of the Madras District Municipalities Act (V of 1920) which runs as follows:

"No person who shall prove that he has paid the sum due on account of the profession tax levied under this Act, or under the Madras City Municipal Act, 1919, or to any tax of the nature of a profession tax imposed under the Indian Cantonments Act, 1910, for the same half-year in any other Municipality or Cantonment in the Madras Presidency shall be liable

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by reason merely of change of business, appointment, residence, or place of business to pay to any Municipal Council more than the difference between such sum and the amount to which he is otherwise liable for the profession tax for the half year under this Act."

This provision is followed by three illustrations, the first two of which refer to the ordinary case where a person, having paid tax in the first Municipality, is exempt, up to the sum so paid from paying again in a second. The third illustration is upon a different point. But although the more common application of the sub-section may be to cases of this nature, we are in agreement with the learned District Munsif that its items are wide enough to cover the converse case illustrated by the facts now under consideration. Applied to those facts, what the sub-section says is that no person who shall prove that he has paid the sum due on account of profession tax for the same half-year in the Chidambaram Municipality shall be liable by reason merely of change of business, appointment, residence, etc., to pay to the Cuddalore Municipality more than the difference, if any, between the Cuddalore tax and the Chidambaram tax; and it makes no difference, in our view, whether the assessee resided and held his appointment first in the one Municipality or first in the other. The phrase "by reason merely of change of business, appointment, residence, or place of business" applies equally to either case. Had the intention been, as contended by the petitioner, to restrict exemption from payment to tax payable in the second Municipality by virtue of payment made in the first, there would have been no difficulty in so wording in the provision. The intention seems rather to be that in no circumstances where a transfer of residence and occupation has taken place shall a person have to pay the tax twice over. We are not concerned with the propriety of this rule once it is clear that it is correct law. But it has at least the merits of encouraging promptitude and vigilance on the part of a Municipal collecting agency and of protecting an assessee against delayed claims.

An attempt has been made to base a further point—that a suit of this nature does not lie—upon the terms of R. 28 of Schedule IV of the Act. That rule, which says that

"the assessment or demand of any tax, when no appeal is made, as hereinbefore provided, and the adjudication of an appeal by the Council shall be final",

clearly has reference to an assessment or demand which the Municipality was empowered by the Act to make.

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Curgenven, J.

Under Sub-section (2) of S. 354 a suit against a Municipality to recover money is only barred if the provisions of the Act have been in substance and effect complied with; and this condition was not fulfilled in the present case. We accordingly dismiss the Civil Revision Petition with costs (one set).

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE TIRUVENKATACHARIAR.

Rangasami Aiyangar ... *Petitioner* (Defendant)*

v.

Somasundaram Chettiar ... *Respondent (Plaintiff)*.

Rangasami Aiyangar v. Somasundaram Chettiar.

Limitation Act, Ss. 19, 20, 21—Co-obligors—Authority of one of, to make payment or sign endorsement so as to bind the others—Inference from conduct of—Circumstances justifying—Evidence Act, S. 91—Promissory note—Joint and several liability of executants under—Oral agreement splitting up, into several liability on part of each to payee—Proof of—Admissibility.

In a case in which a promissory note was executed by several persons, one of them made a part-payment within 3 years of the execution of the note and duly endorsed it on the same. More than 3 years after the date of the note, but within 3 years of the date of the said part-payment, another of the executants of the note made a second part-payment which was duly endorsed on the note by him. Within 3 years of the date of the second part-payment, a third part-payment was made by the two executants who made the first two part-payments and by two other executants, the payment being duly endorsed on the note by all the four.

Held, that the person who made the second endorsement must by his conduct be deemed to have ratified the first payment, that the persons who made the third endorsement must by their conduct be deemed to have held themselves as still bound under the promissory note by reason of the two prior endorsements evidencing part-payments which had already been made, and that the persons who made the first two payments and endorsed them on the note must be deemed to have been duly authorised in that behalf by the two new executants who joined in making the third payment for the purposes of Ss. 19 and 20 of the Limitation Act.

Semble : An oral agreement whereby the joint and several liability of the executants of a promissory note for the balance due on it is split up with the consent of all parties into a several liability on the part of each of the executants to the payee of the note is not obnoxious to S. 91 of the Evidence Act.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Karur in S. C. S. No. 626 of 1925.

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*C. R. P. No. 1112 of 1925. 24th August, 1927.

Rangasami Aiyangar v. Somasundaram Chettiar.

K. S. Krishnaswami Aiyangar for petitioner.

N. Rajagopalachariar for respondent.

The Court delivered the following

JUDGMENT :—The defendant is the appellant. The suit was brought upon oral agreement entered into between the parties on or about the 18th May, 1925, by which the defendant agreed to pay Rs. 55 to the plaintiff in satisfaction of his liability to the plaintiff under a promissory note which had been executed in plaintiff's favour by the defendant and some others jointly on the 31st July, 1915, for Rs. 300. The plaintiff's case is that the executants of the promissory note including the defendant made several payments towards the amount due on the note and after giving credit for such payments there remained some balance due to the plaintiff and that four of the executants of the note agreed each to pay a certain amount to the plaintiff severally in discharge of their joint debt and that in accordance with such arrangement the defendant promised to pay the plaintiff Rs. 55 the suit amount. The defendant in his pleadings denied the oral agreement as true. He contended also that, even if proved, it was invalid under S. 25 of the Indian Contract Act as the debt due under the prior promissory note was barred by limitation and therefore the agreement by the defendant to pay a barred debt will be valid only if it is in writing. The learned District Munsif found the oral agreement sued on was true. He also found that the defendant's liability under the prior promissory note Ex. A was not barred by limitation and upon this finding he gave a decree for the plaintiff for the amount claimed. In this petition both the findings are contested by the defendant. As regards the factum of the agreement it is a question of fact and the finding of the District Munsif cannot be questioned in this petition. The only point which is pressed on his behalf is that so far as the defendant is concerned the prior promissory note had become barred by limitation and that therefore the oral agreement which is sued on is not enforceable having regard to S. 25 of the Contract Act. The prior promissory note is Ex. A, dated the 31st July, 1915. It was executed by six persons of whom the defendant is one, being the second executant of the promissory note. There are three endorsements of part-payments made on the promissory note. The 1st is dated 12th June, 1916, and it evidences a payment of Rs. 250. That payment was by Ramaswamy Dikshitar, the first of the executants. The 2nd

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endorsement is dated the 11th June, 1919, for the payment of Rs. 2 and it is signed by another executant Venkataramana Aiyar. The third endorsement which is dated the 24th May, 1922 was for a payment of Rs. 5 towards interest and it was signed by the defendant and three others. It will be seen that each of the successive endorsements was made within the period of limitation prescribed for a suit on the note and that the oral agreement on which the present suit is brought was made within three years from the date of the last endorsement on the note. The contention which is urged on behalf of the defendant is that the prior endorsements made on the note (A-1 and A-2) which were not made by the defendant but by some of his co-obligors cannot operate as against him to save the promissory note from the bar of limitation either under S. 19 or S. 20 of the Limitation Act, and his own endorsement of payment of interest having been made long after the period of limitation for a suit on the note had expired, does not fulfil the requirements of those sections and cannot therefore save limitation as against him. The District Munsif overruled that plea and in my opinion he was right in doing so. Under Ss. 19 and 20 of the Limitation Act, part-payment or acknowledgment of a debt must, in order to save the debt from limitation, be made by the person liable to pay the debt or by his agent duly authorised in this behalf. S. 21 further provides that nothing in Ss. 19 and 20 shall render one of several joint contractors chargeable by reason only of a written acknowledgment signed or of a payment made by or the agent of, any other or others of them. Where nothing more appears than that one of several co-obligors has made a payment, or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt. It has to be shown that he made such payment or acknowledgment not only on behalf of himself but also as the duly authorised agent of his co-obligors. Such authority however need not be express; it may be inferred from the conduct of several co-obligors. In this case there were three successive endorsements. The 2nd endorsement A-2 was made more than three years after the date of the pro-note and at a time when in the absence of authority on the part of the co-obligor who made the first payment the suit as against the rest would be barred. It must be held that the person who made a second endorsement did by his conduct ratify the prior payment of Rs. 250 which had already been made and the payment of which was endorsed on the pro-note on the 12th June, 1916. So

also when the 3rd endorsement was made on 24th May, 1922, by the four executants including the defendant, the only reasonable inference to be drawn from their conduct is that they held themselves as still bound under the promissory note by reason of the two prior endorsements evidencing part payments which had already been made to the plaintiff therefor. Of the four persons who have signed the endorsement A-3, Ramaswami Dikshatar had made the first payment which was endorsed on the 12th June, 1916, and another namely Venkataramana Aiyar made the second payment which was endorsed on the 11th June, 1919, and the defendant and another for the first time signed in the last endorsement A-3 which purports to be for payment of interest. On these facts it must be held that the defendant and the other co-obligor who for the first time made a payment for interest and signed the endorsement A-3 adopted the previous payments as made on their behalf also; the persons who made those payments and endorsed them on the note must be held therefore to have been duly authorised in that behalf by the defendant for the purposes of Ss. 19 and 20. In a similar case it was so held by Hannay, J., see *Annamalai Pattar* v. *Natesa Aiyar* (1). I am therefore of opinion that as against the defendant the promissory note Ex. A was not barred at the date of the oral agreement on which the suit is brought. It follows therefore that the oral agreement is not void under S. 25 of the Indian Contract Act.

The applicant wants to raise a new ground, namely, that the oral agreement sued on cannot be set up as it amounts to a variation of the written contract embodied in Ex. A and as proof of such agreement effected only orally is barred under S. 91 of the Evidence Act. This point was not raised either in the lower court or even in the grounds of the application and it is raised for the first time now. The plaintiff's case is that the joint and several liability of the executants under the promissory note for the balance due on it was split up with the consent of all parties into a several liability on the part of each of the executants to the plaintiff. I do not see how this arrangement is obnoxious to S. 91 of the Evidence Act. Further I am not prepared even if the point is arguable to allow the plaintiff to raise such a technical plea for the first time at this stage of the case. The application is dismissed with costs.

A. S. V. *Petition dismissed.*

1. (1914) M. W. N. 792.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Muniswami Mudali and another ... *Petitioners** (*Petrs.-Defts.* 2 & 3)

v.

Meenakshi Ammal ... *Respondent* (*Respt.-Plff.*).

Muniswami Mudali v. Meenakshi Ammal.

Order—Petition—Order on, recording petition—Validity.

The order passed on a petition should be one either allowing it or dismissing it. An order stating that the petition will be recorded is no order at all.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Vellore in I. A. No. 898 of 1925 in O. S. No. 417 of 1924.

P. S. Narayanaswami Aiyar for petitioners.

A. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the District Munsif of Vellore. The order is "the petition will be recorded." This is no order at all. Such an order should not have been passed on any petition. The District Munsif should have either allowed the petition or dismissed it. The order is therefore set aside and he is directed to hear the petition on the merits and dispose of it.

Costs of this application will abide the result.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Edavalath Potayur Manakkal Maheswaram Nambudripad Karnavan and Manager of the Illom ... *Appellant*† (*Respondent*)

v.

Thiruvazhiyot Velappa Menon ... *Respondent* (*Petitioner*).

Manakkal Maheswaram Nambudripad v. Velappa Menon.

Civil Procedure Code, O 21, R. 17 (1)—Amendment of execution application when within scope of—Effect—Sub-rule (2) of R. 17—Effect.

On the last day of the 12th year from the date of a decree, an application for the execution thereof was presented, in which application, however, the name of the legal representative of the judgment-debtor was not correctly entered. The defect was not, owing to the destruction of the previous

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*C. R. P. No. 480 of 1926. 19th October, 1927.

†C. M. S. A. No. 161 of 1925. 3rd May, 1927.

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records in the Moplah rebellion, detected at once. The notice of the execution application directed to the person named in it as the legal representative was returned with the endorsement that he was dead. Then the decree-holder applied for amendment of the execution application by substituting the correct name. The Court, which only then became aware of the defect, allowed the amendment. Then it was more than 12 years after the decree under execution.

Held, that the amendment fell within the scope of O. 21, R. 17 (1), Civil Procedure Code, and that, therefore, by virtue of sub-rule (2) of the said rule, the application as amended must be deemed to have been one in accordance with law presented on the date when it was first presented.

Parties should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in their execution applications.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 27th July, 1925, in A. S. No. 22 of 1925 (A. S. No. 335 of 1924 on the file of the District Court of South Malabar) preferred against the decree of the Court of the District Munsif of Parapanangadi in E. P. No. 591 of 1923 in O. S. No. 521 of 1907 (A. S. No. 634 of 1909, S. A. No. 85 of 1909, C. M. P. No. 663 of 1914, A. S. No. 783 of 1914 and A. S. No. 70 of 1915).

K. Kuttikrishna Menon for appellant.

P. S. Narayanaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The legal representative of the judgment-debtor is the appellant. The question for decision is whether the execution application presented by the respondent on 4th April, 1923 is barred by limitation. The facts are these: The original judgment-debtor, one Narayanan Nambudripad, died. On his death, execution was taken in 1917 against his legal representative, Vasudevan Nambudripad. He also died. In 1920 by Ex. B execution was then taken against his legal representative Maheswaram Nambudripad. This execution petition was dismissed for non-payment of batta for notice. The petition out of which this Civil Miscellaneous Appeal arises was presented on 4th April, 1923, within 3 years from the last application and on the last day of the 12th year from the date of the second appeal decree. In this application the respondent showed the deceased Vasudevan as the counter-petitioner and not Maheswaram as he should have done. The notice was returned with the endorsement that the counter-petitioner was dead. Then the petitioner applied for amendment of the execution application by substituting the name of Maheswaram for that of the deceased Vasudevan. The amendment was

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allowed on 6th July, 1923 when it was more than 12 years after the decree in the Second Appeal.

The last execution application presented on 4th April, 1923 was admittedly infructuous as nothing could be done in pursuance of it, as it was presented against a dead man and not against the proper living legal representative. If the substitution of the present appellant's name is valid under the provisions of sub-rule (1) of R. 17 of O. 21 of the Code of Civil Procedure, then, by virtue of sub-rule (2), the application as amended must be deemed to have been an application in accordance with law, and presented on the date when it was first presented and therefore not barred by limitation. If the amendment does not, however, satisfy the requirements of the said rule, then, the appellant's name having been substituted only on 6th July, 1923 the execution petition under appeal can be deemed to have been presented against him only on 6th July, 1923 when 12 years had elapsed after the passing of the decree and is so barred, is the argument urged on behalf of the appellant.

Under O. 21, R. 11 (2), cl. (*i*) every application for execution shall contain among other particulars the names of the persons against whom execution of the decree is sought; under O. 21, R. 17, cl. (1), Civil Procedure Code, the Court shall ascertain whether the requirements laid down in R. 11 have been complied with; if not complied with, it is open to the Court to reject the application or to allow the defect to be rectified.

In the present case the name of the legal representative was not correctly entered in the application for execution. On this ground the Court could have either rejected it at once or allowed the defect to be remedied; but the Court did not detect the defect on account of the destruction of the previous records due to the Moplah rebellion. If the records had been available there can be no doubt that the Court would have adopted either of the courses mentioned above. The attention of the Court, however, was drawn to the defect later by the application for amendment already referred to and the amendment asked for was allowed by the Court. Parties should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in their execution applications. See the principle of the decision in *Vemuri*

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Pitchayya v. *Raja Yarlagadda Ankineedu* (1). The dictum of Jackson, J., in *Sankaran Nair* v. *Ambu* (2) relied on by the applicant no doubt supports him to a certain extent, but that is in conflict with the decision of the Bench in *Vemuri Pitchayya* v. *Raja Yarlagadda Ankineedu* (1). Further we may point out that the failure to furnish a list of immoveable and moveble properties by the decree-holder stands altogether on a different footing.

It is true that the lower Court is wrong in ascribing decree-holder's mistake to the destruction of his vakil's records during the rebellion. The evidence shows that the prior application was in the office of his vakil and that by the exercise of some care and diligence the mistake could well have been avoided. It is, however, not shown that the mistake was otherwise than *bona fide*. Evidently the error must have crept in on account of an oversight.

In these circumstances we think the amendment fell within the scope of O. 21, R. 17, cl. (1) of the Code of Civil Procedure and therefore by virtue of sub-rule (2) the application as amended must be deemed to have been one in accordance with law presented on the date when it was first presented.

In this view we agree with the learned Subordinate Judge and hold that the present application is not barred by limitation. The appeal against appellate order is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE RAMESAM.

Meenal ... *Petitioner* (Plaintiff)*

v.

Govindasami Naidu ... *Respondent (Deft.).*

Meenal v. Govindasami Naidu.

Revision—Small Cause Revision—Question of fact—Interference in case of—Conditions

The High Court's power to interfere in Small Cause Revision on a question of fact is confined to cases in which the judgment of the Court below is obviously wrong and perverse.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Sivaganga in S. C. S. No. 174 of 1925.

A. Sundaram Aiyar for petitioner.

P. N. Marthandam Pillai for respondent.

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*C. R. P. No. 1355 of 1926. 4th March, 1927.

1. (1923) 45 M L J 651. 2. (1925) 49 M L J 699.

Meenal v. Govindasami Naidu.

The Court delivered the following

JUDGMENT :—The question is whether Ex. A is genuine. This is a question of fact. The learned vakil for the petitioner argued that the Subordinate Judge's appreciation of the evidence was influenced by his erroneous conception of the law relating to a vendor's covenant as to title, but I am not satisfied that there is anything erroneous in the Subordinate Judge's statement of the law. The vakil also argued that the Subordinate Judge's statement about the ink of the signatures of the two attesting witnesses is not correct though the difference in ink is not quite convincing to me that the origin of the document is suspicious. I cannot say there is no difference. Similar remarks apply to the Subordinate Judge's statement about the last sentence in the document and to the last four lines and middle four lines being written closely.

It may be that the High Court has power to interfere in Small Cause Revision even on the question of fact, *Nathuram Shivnarayan* v. *Dhularam Hariram* (1), but that can apply only in a case when the Lower Court's judgment is obviously wrong and perverse and only one conclusion is possible. I am not able to say that here.

The Civil Revision Petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE WALLACE.

[Reference under S. 429, Cr. P. Code, on a difference of opinion between Madhavan Nair and Jackson, JJ.]

The Public Prosecutor ... *Appellant**

v.

V. M. Ratnavelu Mudali ... *Accused.*

The Public Prosecutor v. Ratnavelu Mudali.

Petroleum Act (VIII of 1899), Ss. 5 and 15—Transport license—Possession or keeping of petrol for the process of and during the transport if included in—Such possession or keeping if an offence under Ss 5 and 15 of Act.

The accused held a license for storage of 500 gallons of petrol and had a store for that quantity at Katpadi. He was the agent of the Burma Oil Company and as their agent also held a transport license for transport of petrol without limit of quantity. On the evening of 28th November, 1926 he took delivery at the Katpadi railway station of 1,000 gallons.

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*Criminal Appeal No. 224 of 1927. 28th September, 1927.

1. (1920) I L R 45 B 292.

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He carried those to his premises, put 500 in store, disposed of another 100 before dark, and kept the remaining 400 in bandies on his premises overnight with a view to transporting them in the morning to Vellore and Madanapalle for which places he had booked orders. At 10 A. M. on the 29th morning the Police visited the premises and found the 400 gallons in excess.

Held, that the accused was not guilty of an offence under Ss. 5 and 15 of Act VIII of 1899.

The possession of the excess petrol during the halt overnight was not the "keeping" of petrol within the meaning of S. 5 (1) of the Act. A license to transport includes permission to possess or keep for the process of and during the transport. The halt in this case was during and in the process of transportation and the possession of petrol during that period is therefore not an offence.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Joint Magistrate of Tiruppattur in Calendar Case No. 48 of 1926 on his file.

K. N. Ganapathi for Public Prosecutor.

V. L. Ethiraj for accused.

The Court delivered the following

JUDGMENTS :—*Jackson, J.* :—Appeal by Government against the acquittal of accused in Calendar Case No. 48 of 1926 by the Joint Magistrate, Tiruppattur.

Jackson, J.

Accused holds a license to possess 500 gallons of petrol at Katpadi. On the evening of 28th November, 1926 he took delivery of 1,000 gallons at Katpadi railway station. At 10 A. M. on the 29th November, 1926 his premises were visited by the Police and he was found to be in possession of 900 gallons. His brother who was examined on his behalf (D.W. 1) explained that 500 gallons were to be retained at Katpadi, and 400 gallons were for despatch to Vellore and Madanapalle.

The learned Magistrate acquitted the accused on the ground that

"the quantity in excess of the amount allowed by his license, 400 gallons, was really intended for distribution and not for possession, and was therefore covered by his transport license. His temporary possession of the excess quantity for a few hours was inevitable in the circumstances and does not amount to the possession contemplated in S. 15, Act VIII of 1899".

If a licensee is found to be keeping quantity of petrol upon his premises in excess of the licensed amount he infringes S. 5 (1) of the Act.

"No quantity of dangerous petroleum exceeding forty gallons shall be kept by any one person or on the same premises except under a license, etc."

It is no excuse in such circumstances to plead that the petrol thus kept is "for distribution". Petrol is always kept for distribution, and if it were held that S. 5 does not cover petrol kept for distribution no one need ever take out a license.

When he says that the possession is therefore covered by the transport license, the learned Magistrate does not appear to be referring to any specific document. Nothing of the sort was exhibited by the accused and though this Court adjourned the case for this purpose nothing is forthcoming. He seems to mean that the accused had power to license the transport of the petrol from Katpadi to Vellore and to Madanapalle. Strictly speaking, the accused should have issued a transport license to remove the 1,000 gallons from Katpadi railway station to his Katpadi depot, and then he should have issued a license for 200 gallons to be removed north to Madanapalle, and for 200 gallons to be removed south to Vellore. As the Police intervened before these supplies were despatched to either place probably no licenses were actually issued.

The reference to the license, or rather the power to license, is all part of the Magistrate's argument that possession with the intention to distribute is not possession under S. 5 of the Act. The accused in his opinion intended to license consignments to Vellore and to Madanapalle, and had the power to do so ; and from the time that he took delivery at the railway station until he removed the petrol respectively to Vellore and to Madanapalle there was merely the act of transport and not the act of possession. In answer to this contention it is only necessary to repeat that if taking from the railway station, keeping at the depot and removing to the market, are all mere incidents in the act of transport, there would be no need for any one to take out a license for keeping.

But the Magistrate may intend his theory only to apply to "the temporary possession of the excess quantity for a few hours". He may mean, that is to say, that the 'intention to distribute' by itself is not enough to excuse the keeping of an excess quantity ; it must be intention to distribute coupled with the fact that the period of keeping is short. If the argument proceeds upon those lines, it is difficult to determine what periods may be said to be short enough or too long. If a man may keep petrol in excess for 16 hours, may be for 32, or for 64? It may be said that a mere halt in the process of transport

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Jackson, J.

cannot be counted as keeping but, whatever force that idea may have, at any rate it has no applicability to the present case.

A period from sundown till 10 o'clock next morning is not the ordinary halt of bandyman. The true solution of the difficulty is to hold that, under the statute, a man, who possesses petrol and is not removing it, is keeping it.

But in certain circumstances, as for example, wayside halts, the infringement would be so entirely technical as to be nugatory and no authority would think of directing a prosecution. But there is obviously a very great difference between a wayside halt and keeping petrol in a depot for sixteen hours. In the latter case the heinousness of the offence may be arguable, but, that the offence has been committed seems to admit of no doubt.

As a further plea, the Magistrate holds that the possession besides being only for a few hours, was inevitable in the circumstances. There is nothing in the terms of the license to excuse "inevitable breaches". Nor, as to what exactly the circumstances were, is there any finding and without a finding the term 'inevitable' is meaningless. A firm which has a depot licensed only to contain 500 gallons can avoid keeping an excess quantity in that depot by confining its consignments to 500 gallons, provided that the depot is empty. And an agent who takes delivery of more gallons than he may lawfully keep in his depot can avoid the infringement of his license by despatching the petrol direct to the outlying markets from the railway station. In the present case no more than 500 gallons need have been consigned, and, as 1,000 were consigned, the accused might have despatched 500 straight to Vellore and Madanapalle. The infringement so far from being inevitable was eminently avoidable. I should not consider that we were bound by this finding of inevitability, because, on the evidence, it is perverse, nor do I consider that it has any force in law.

To sum up. If a person licensed to keep 500 gallons keeps 900 gallons of petrol in his depot, he commits an offence under Ss. 5 and 15, Indian Petroleum Act (VIII of 1899).

He may plead that he had not kept the excess quantity very long, and had not intended to keep it much longer, but, this is only a plea of extenuation which cannot be regarded as a plea of acquittal.

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Jackson, J.

The case on which the learned Magistrate relies, *Swaminatha Aiyar* v. *Emperor* (1), does not traverse this view. In that case a person who had no depot dumped the petrol upon the railway platform and there and then sold it to customers. It was held that the accused would be guilty of unlawful keeping, if he had kept the petrol on the railway premises for a length of time which would not be required in the ordinary course of business for purposes of distribution, but, apparently in that case the accused dealt out the cans to the various purchasers so promptly that the whole transaction was entirely one of removal. I do not think that this ruling would cover circumstances in which a longer period was occupied.

Suppose, for instance, a man set up a sort of petrol shop on the platform, and spent 16 hours distributing petrol to customers, he would be held, I think, to be keeping petrol within the mischief of the Act.

I would allow the appeal. The Public Prosecutor is only concerned with the interpretation of the law and does not press for a penalty. I would therefore inflict a nominal sentence of a fine of one rupee. But since the case will have to go before a third Judge, this is a mere expression of opinion.

Madhavan Nair, J.

Madhavan Nair, J. :—I have had the advantage of reading the judgment prepared by my learned brother. I regret I cannot agree with his view.

The facts of the case are admitted; and the learned Public Prosecutor has argued the question of law on the findings of fact arrived at by the learned Joint Magistrate.

The accused was found on the 29th November, 1925, to be in possession of 900 gallons of petrol of which he was admittedly entitled to keep 500 gallons as per license. The remaining 400 gallons contained in 200 cans were received by him as sub-agent of the Burma Oil Company under a transport license for despatching them to Vellore and Madanapalle. It is not denied that this transport license entitled him to receive the petrol sent to him by the Burma Oil Company and to despatch it to various places. The 200 cans which were received on the evening of the 28th November, were ready for despatch and were kept loaded in bandies for that purpose at 10 A. M. on the 29th when the Police made their surprise visit. It has been found that this excess quantity was really intended for distribution and its possession for a few hours was inevitable in the

1. (1917) M W N 720.

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Madhavan Nair, J.

circumstances. The correctness of the latter finding has not been questioned before us. Nothing has been suggested against the *bona fides* of the accused in this case. What is suggested in argument is that if, for purposes of legitimately transporting petrol covered by a transport license, it is inevitable that the agent should keep petrol with him temporarily for a few hours, then, unless he protects himself by a special license for such purpose, he will be guilty of possessing petrol in contravention of the Indian Petroleum Act and will be liable for prosecution under S. 15 (*a*). Neither the Act nor the Rules provide for any temporary storage license.

The question for consideration is whether temporary possession of petroleum, which is inevitable in the circumstances and which is covered by a transport license, amounts to 'possession' in contravention of the Indian Petroleum Act (VIII of 1899), within the meaning of S. 15 (*a*). That section says:

"Whoever in contravention of this Act or any of the rules thereunder, imports, possesses or transports any petroleum"

shall be liable to certain penalties. S. 5 (1) of the Act which refers to dangerous petroleum says:

"No quantity of dangerous petroleum exceeding forty gallons shall be imported or transported or kept by any one person or on the same premises, except under, and in accordance with the condition (if any) of, a license from the Local Government".

S. 11 which refers to the possession or transport of petroleum which is not dangerous states that

"No quantity of petroleum exceeding five hundred gallons shall be kept by any one person or on the same premises, or shall be transported, except under, and in accordance with the conditions of, a license granted under this Act".

In *Swaminatha Aiyar* v. *Emperor* (1), in circumstances very similar to the present, it was held by Abdur Rahim and Napier, JJ., that for a prosecution under S. 15 (*a*) for possession of petroleum in contravention of the Act, the possession of the same must be such as to amount to 'keeping' within the meaning of S. 11, and that a person cannot be said to 'keep' petroleum, if he distributed the same within a reasonable time of taking delivery by him. Thus laying down the law, the learned Judges stated that "It has to be found whether upon the evidence as produced at the trial, there was 'possession' or 'keeping' within the meaning of Ss. 11 and 15 (*a*) on the part

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Madhavan Nair, J.

of the accused of more than 500 gallons of petroleum" and for this purpose they remitted the appeal to the Sessions Judge. In the same case the learned Judges also point out that, if the agent had induced the railway authorities to allow him to keep the consignment exceeding 500 gallons on the premises for a length of time which would not be required, in the ordinary course of business, for the purposes of distribution, it would be 'keeping' or 'possession' within the meaning of Ss. 11 and 15 of the Act. These observations clearly show that the question whether there was possession in contravention of the Act of the excess petroleum within the meaning of S. 15 (*a*) is really one of fact and has to be decided with reference to the facts of each particular case. As I have said, it has been found here that the possession of the excess petroleum was inevitable in the circumstances of the case and this finding has not in any way been attacked. We should not attempt to minimise its effect by suggesting that the accused could have transported the petrol in a shorter time or more satisfactorily by following any other method or by finding now that in the present case there were no compelling circumstances. I am not dealing with the case on the assumption that the 'delay' in this case was avoidable, because that plea has not been put forward by the Public Prosecutor. I think the finding amounts to this, that the accused was about to remove the excess petrol for purposes of distribution within a reasonable time after its receipt when the Police made a surprise visit. I think the keeping of petroleum received under a transport license, for a short period which is incidental to, and necessary for, the distribution of it cannot amount to 'keeping' or 'possession' within the meaning of Ss. 5, 11 and 15 (*a*). The question whether the period of time is short enough to be considered reasonable or too long to be considered unreasonable will have to be decided with reference to the particular facts of each case and this is precisely what is laid down in *Swaminatha Aiyar* v. *Emperor* (1). If this is not the correct view, I think transportation of petrol from one place to another for distribution to customers, which is perfectly legal under the Act, will become well-nigh impossible and the distributing agent, unless he is always on the move, will be liable to prosecution. Ss. 5 and

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11 of the Act should not be construed as if they stood alone in the Act. We must give a reasonable interpretation to the provisions of the Act.

Madhavan Nair, J.

In my view, this case is governed by the principle of the decision in *Swaminatha Aiyar* v. *Emperor* (1). I would, therefore, uphold the order of acquittal passed by the learned Joint Magistrate and dismiss the appeal by the Government.

By the Court :—Owing to the difference of opinion between us, the case will be posted before the Chief Justice for passing orders under S. 429, Criminal Procedure Code.

The case being posted before Wallace, J., the Court delivered the following

Wallace, J.

JUDGMENT :—This appeal has been posted before me owing to a difference of opinion between Jackson, J., and Madhavan Nair, J. It is an appeal by Government against the acquittal of the accused by the Joint Magistrate of Tirupattur. The charge against him was illegal possession of petrol in excess of the quantity covered by his license to 'keep' petrol.

The facts not disputed are that the accused holds a license for storage of 500 gallons of petrol and has a store for that quantity at Katpadi. He is the agent of the Burma Oil Company and, as their agent, also holds a transport license for transport of petrol without limit of quantity. On 28th November, 1925 evening he took delivery at the Katpadi railway station of 1000 gallons. He carried these to his premises, put 500 in store, disposed of another 100 before dark, and kept the remaining 400 in bandies on his premises over night with a view to transporting them in the morning to Vellore and Madanapalle for which places he had booked orders. At 10 A. M. on the 29th morning, the Police visited the premises and found the 400 gallons in excess. The case was argued before me, and I think also before the learned Judges of the Bench, on the footing that these 400 gallons were really intended for transport and would have been transported on that morning if the Police had not paid their visit. The question therefore resolves itself into this: Does a transport license cover a halt over night, say from sundown till 10 A. M. next

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morning, so that the possession of petrol during that halt is not the 'keeping' of petrol within the meaning of S. 5 (1) of the Act.

Now a license for the transport of petrol must obviously include permission to be in possession of the petrol for the purpose of and during the process of transportation. It would be absurd to hold that, in addition to the license to transport, the transporter, *e. g.*, the bandyman, must be in possession of a license to keep petrol on his 'premises' or that every place at which he halts on his way must also possess a license to 'keep' petrol. A license to 'keep' petrol lays down stringent conditions as to the nature of the building, etc., and these cannot by any stretch of imagination be held applicable to a country cart or a motor lorry or a railway waggon. Also so long as Govenment does not lay down rules regarding the issue of temporary licenses to cover such temporary possession if they consider such possession illegal without a license of that nature or regarding the provision of licensed halting places which transporters must use, it is unreasonable to hold that the transporter cannot, except on peril of prosecution, halt his consignment for a few hours over night in places which are not formally licensed to keep petrol. The transport of petrol during the night time obviously has its own dangers. Therefore it must be taken to be the law, and also is common sense, that a license to transport includes permission to possess or keep for the process of and during the transport.

Now if the transporter, the accused in this case, had halted at any other place on his journey from the railway station to his destination from sundown to 10 A. M. with his consignment of petrol, I would not hold that this was such an unreasonable halt that it cannot be said to have been in the process of transport or can be said to constitute the possession of petrol during that halt a keeping of it within the meaning of S. 5 (1) of the Act. If then such a halt would not be an offence in regard to any other place, it cannot be an offence, because the place at which the bandies were kept was the accused's own premises. The fact that he has a store for petrol there makes no difference. If a halt just outside his premises is no offence, it does not become an offence if the halt is within the premises. The halt was during and in the process of transportation and the possession of petrol during that period is therefore not an offence.

I therefore agree with Madhavan Nair, J., and hold that no offence has been committed and I therefore dismiss this appeal.

A. S. V. *Appeal dismissed.*

The Public Prosecutor v. Ratnavelu Mudali. — Wallace, J.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

LORD CARSON, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

Ardeshir Bhicaji Tamboli ... *Appellant** (*Plaintiff*)

v.

The Agent, Great Indian Peninsula Railway Company, Bombay ... *Respondent* (*Defendant*).

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Indian Railways Act, 1890, S. 72—Risk Note, form H—Signature of agent in name of Firm—Effect of non-attestation of signature—Risk Note attaches immediately on delivery and acceptance of goods—"Wilful neglect"—Destruction of goods by 'fire'.

Under S. 72, Indian Railways Act, 1890, an agreement (popularly known as a "Risk-Note") limiting the liability of a railway company as bailee of goods, delivered to it for carriage by railway, is required to be "in writing signed by or on behalf of the person sending or delivering to the railway administration the goods". The appellant, who carried on business at Amalner in the name of Tamboli Brothers, delivered certain goods at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. The risk-note in respect of these goods bore the signature of Tamboli Brothers. It appeared, however, that the signature of Tamboli Brothers affixed to the risk-note was in the handwriting, not of the appellant himself, but of his nephew, Jamsetji (who was admittedly the appellant's duly authorized agent in the matter), and it was contended on behalf of the appellant that a signature in the name of the firm was ineffective, unless it appeared on the face of the document that the signature was affixed either by the sender of the goods himself or by the hand of an agent whose agency was disclosed. *Held,* overruling this objection, that, as it was plain on the evidence that the nephew, Jamsetji, had full authority to sign the name of the firm, it was unnecessary that he should purport to sign it as agent. The signature in question was, therefore, a sufficient compliance with the requirements of the Statute. *France* v. *Dutton,* (L. R. 1891, 2 Q. B. 208) relied on.

A form of Risk-Note (Form H) approved by the Governor-General in Council under S. 72, sub-section (2) (*b*), of the Indian Railways Act, 1890, contained at the end of it space for the attestation of the execution of the document by two witnesses. *Held,* that, although attestation by two witnesses was contemplated in the form as approved, such attestation was not an essential part of the form and was not a condition precedent to the validity of the risk-note, inasmuch as the section does not provide that the agreement (*i. e,* the risk-note) shall be attested, and,

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* P. C. Appeal No. 17 of 1927. 28th November, 1927.

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while it requires that the form shall be approved by the Governor-General in Council, it does not entrust that functionary with the duty of providing for the attestation of the document.

Where attestation of a document is, by law, obligatory and an essenial part of the document, *quaere,* whether the same person could both execute and witness the document.

A risk-note, in the prescribed form (Form H) and duly signed, protects the railway company from liability as soon as the goods are delivered to it for carriage and accepted by the company. In other words, the risk-note attaches to the goods immediately on such delivery and acceptance, and not merely from the time when the goods are actually despatched by the company to their destination. Their lordships rejected as untenable the contention that "until the goods had been loaded on waggons for transport, or at all events until the railway company had given a receipt for the goods specifying that they were to be carried at the reduced rate the risk-note had no application to them, and the railway company were mere ordinary bailees of the goods".

Where, under the express terms of a risk-note (in Form H), the railway company was exonerated from liability for loss, etc., to goods, except where the loss was due to its wilful neglect, and there was (in the present case) ample evidence of negligence on the part of the company, it was held that the company could not be made liable merely on this account, in the absence of evidence or finding of 'wilful neglect'. The latter expression means that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. *R.* v. *Downes* (L. R. 1875, 1 Q. B. D. 25) and *R.* v *Senior* [L. R. 1899, 1 Q. B. 283, at pp. 290, 291 (Per Lord Russell)], relied on.

Goods delivered to the respondent company at Amalner for being carried to Bombay were, while lying on the station platform at Amalner awaiting transport, destroyed by fire. It was found that the respondent company's servants had been guilty of negligence. *Held,* that the company was protected from liability by reason of the risk-note (Form H), and as 'wilful neglect' was negatived, it was unnecessary for their lordships to consider the effect of the final *proviso* to the risk-note which declared *inter alia* that "the term 'wilful neglect' be not held to include fire".

Appeal (No. 17 of 1927) from a judgment and decree of the High Court, Bombay (Fawcett and Madgavkar, JJ.), dated the 5th October, 1925, reversing a decree of the Subordinate Judge of Dhulia, dated the 18th September, 1922.

The material facts are given in their lordships' judgment, and also in the judgments of the Court of Appeal, where the authorities are discussed at length. (See I L R 50 Bom. 284: 28 Bom. L. R. 718).

The risk-note in question (Form H) is set out in the judgment of the Privy Council, and S. 72 of the Indian Railways Act, 1890, is given below for facility of reference :—

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72. (Measure of the general responsibility of a railway administration as a carrier of animals and goods). (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Ss. 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it

(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(*b*) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

Geoffrey Lawrence, K. C., and *Raikes* for appellant.

Stuart Bevan, K. C., and *K. Brown* for respondents.

Their Lordships' judgment was delivered by

The Lord Chancellor.

THE LORD CHANCELLOR.—The appellant, who is a commission agent carrying on business in the Bombay Presidency, delivered, on the 5th February, 1920, 128 bales, and on the 7th February, 1920, 162 bales of cotton at the Amalner Station of the respondent company for transport to the appellant's business premises at Kurla. Of the 290 bales so delivered, 216 were duly put on board the respondent company's wagons and carried to Kurla, but the remaining 74 bales, together with a large number of bales belonging to other consignors, remained on the station platform at Amalner awaiting transport. On the 25th February, a fire broke out in some of these bales, and, the appliances available in case of fire being inadequate, the greater part of the bales at Amalner Station, including the 74 bales belonging to the appellant, were destroyed. Thereupon the appellant brought this suit against the respondent company, alleging that the destruction of the 74 bales was due to the negligence of the company's servants, and claiming damages for his loss.

The suit was tried by the Subordinate Judge of Dhulia, who found that the respondent company's servants had been

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guilty of negligence, and gave judgment for the appellant for Rs. 10,518 as damages; but, on appeal by the respondents to the High Court of Judicature at Bombay, that Court, while agreeing with the Trial Judge as to the finding of negligence, held that the respondent company was protected from liability by a document dated the 3rd November, 1919, and referred to in the proceedings as a "risk-note." The question to be determined on this appeal is whether the respondent company is so protected.

The risk-note was in the following terms:—

"Whereas all consignments of goods or animals for which the G. I. P. Railway Administration quotes both owner's risk or special reduced rates and Railway risk or ordinary rates are (unless I|we shall have entered into a special contract in relation to any particular consignment) despatched by me|us at my|our own risk and are charged for by the G. I. P. Railway Administration at special or reduced owner's risk rates instead of at ordinary tariff or Railway risk rates, I|we, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the G. I. P. Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Amalner Station to Kurla Station harmless and free from all responsibility for any loss, destruction or deterioration of or any* damage to all or any of such consignments from any cause whatever (except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them) before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments: provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any unforeseen event or accident."

The note bore the signature of Tamboli Brothers, which is the name under which the appellant carries on business, and was witnessed by Jamsetji Tamboli and another person.

On the hearing of the appeal before this Board, the finding of negligence, which had been concurred in by both the Courts in India, was not disputed, but it was argued that on several

*The word 'any' in the above passage before "damage' is not in the Risk-Note, which reads thus: "harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignments". It is probably a clerical error in their Lordships' judgment.—K. J. R.

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grounds the risk-note did not protect the respondent company from liability.

First, it was said that the note did not comply with the requirements of S. 72 of the Indian Railways Act, 1890, which requires that an agreement purporting to limit the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods shall, in so far as it purports to effect such limitation be void, unless it (a) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and (*b*) is otherwise in a form approved by the Governor-General in Council. It appeared that the signature of Tamboli Brothers affixed to the risk-note was in the hand-writing, not of the appellant himself, but of his nephew, Jamsetji Tamboli, and it was argued that a signature in the name of the firm was ineffective, unless it appeared on the face of the document that the signature was affixed either by the sender himself or by the hand of an agent whose agency was disclosed. In their Lordships' opinion this objection has no weight. It was plain on the evidence that Jamsetji had full authority to sign the name of the firm, and if so, it was unnecessary that he should purport to sign it as agent. If authority for this proposition is required, it will be found in the case of *France* v. *Dutton* (1).

It was further argued that the risk-note was void as not being in a form approved by the Governor-General in Council. It was admitted that the body of the note was in the Form H approved by Order in Council; but the form so approved contains at the end of it space for the attestation of the execution of the document by two witnesses, and it was said that, as Jamsetji Tamboli, the first witness attesting the risk-note, was the person who executed the risk-note in the name of the firm, he was not a suitable witness to its execution. If it were an essential part of the form approved by the Governor-General in Council that the note should be attested by two witnesses, it would, no doubt, be necessary to consider whether Jamsetji Tamboli could both execute and witness the document; but in their Lordships' opinion the attestation by two witnesses is not part of the document prescribed. Paragraph (*a*) of S. 72 (2) of the Act of 1890, which alone deals with the execution of an agreement of this nature, does not provide that the agreement shall be attested; and paragraph (*b*) of the same subsection, while it requires that the form shall be approved by

1. L. R (1891) 2 Q. B. 208.

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the Governor-General in Council, does not entrust that authority with the duty of providing for the attestation of the document. This being so, it cannot be held that attestation by two witnesses, although contemplated in the form as approved, was an essential part of the form. This argument, therefore, falls to the ground.

But the principal argument put forward on behalf of the appellant was, that the risk-note did not attach to the 74 bales in question at all. It was pointed out that the note, by the terms of the recital contained in it, applies to goods despatched by the sender and charged for by the railway administration at reduced rates, and it was said that until goods had been loaded on wagons for transport, or at all events until the railway company had given a receipt for the goods specifying that they were to be carried at the reduced rate, the risk-note had no application to them, and the railway company were mere ordinary bailees of the goods. In their Lordships' opinion this contention cannot be supported. The appellant, in his plaint, pleaded that the 290 bales were "given in the possession of the defendant at the Amalner Station on the 5th February, 1920, and 9th February, 1920, respectively, for being carried to Bombay," and that "the defendant took them in his charge on or about the aforesaid dates as for being carried to Bombay." This pleading is fully supported by the consignment-notes signed by the appellant on the dates of the delivery of the goods, namely, on the 5th and the 7th February; for, by each of these consignment-notes he requested the railway company to receive the goods therein described and forward them by goods train to Kurla. Further, the conditions endorsed on each of the consignment-notes provided that, when articles were delivered for conveyance, the responsibility of the railway for the loss, destruction or deterioration of the articles should be subject to the provisions of S. 72 of the Indian Railways Act, 1890. In these circumstances it appears to their Lordships that the goods were delivered to the railway company for carriage and were so accepted and that consequently the responsibility of the railway company for each parcel of goods accrued fothwith on the delivery of the goods and the acceptance of such delivery—that is to say, on the 5th and 7th February—and accordingly that the risk-note attached to them immediately on such delivery and acceptance. Reliance was placed on the provision contained in the risk-note which prevented the note from attaching if the sender "shall have entered into a special contract in relation to any particular

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consignment," and it was suggested that in view of this provision, which was referred to as an option to the sender to enter into a special contract, the note did not attach until the goods were actually despatched. The answer is that no such special contract had been entered into, or indeed proposed, as to these particular goods, and accordingly that they fell under the general provisions of the risk-note. This contention, therefore, also fails.

Lastly, it was argud on behalf of the appellant that the loss of the 74 bales was due to the wilful neglect of the railway administration or its servants, and accordingly that the case fell within the express exception contained in the risk-note. Upon this point their Lordships find themselves in agreement with the opinion of Mr. Justice Madgavkar, which was expressed as follows:—

"The remaining question is whether any wilful neglect on the appellant's part was proved. It appears upon the evidence that the means of extinguishing fire were not as they ought to be in the case of a large cotton exporting station such as Amalner. One hydrant was certainly not working and the water was not at sufficient pressure. Probably, on the whole, this was neglect, but not, I think, wilful neglect within the meaning of risk-note form H, so that the company should be made liable merely on this account."

In support of this view reference may be made to the cases of *R. v. Downes* (2) and *R. v. Senior* (3), in the latter of which cases Lord Russell interpreted the expression "wilful neglect" as meaning that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. In the present case there was ample evidence of neglect, but no evidence or finding of wilful neglect; and accordingly it is unnecessary to consider the effect of the final proviso to the risk-note which declares that "wilful neglect" shall not include fire.

For these reasons their Lordships agree with the decision of the High Court of Judicature at Bombay, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Solicitors for appellant : *Lattey and Dawe.*

Solicitor for respondent : *Solicitor, India Office.*

K. J. R. *Appeal dismissed.*

Reporter's Note :—1. The decision of the Calcutta High Court in *Mahabarsha Bankapore* v. *The Secretary of State for India in Council,* (1915) 20 C. W. N. 685, that, "when the law says 'signed', it means the writing of the name of the person who signs it either by his

2. L R (1875) 1 Q B D 25. 3. L R (1899) 1 Q B D 283.

own hand or by the hand of an agent who must be disclosed and have authority", must now be taken to be overruled by the above pronouncement of the Judicial Committee.

2. Their lordships left open the question whether the risk-note (Form H) would protect the railway company from liability for loss of goods, where such loss was due to 'fire' caused through the 'wilful neglect' of the company's servants. A Division Bench of the Lahore High Court has recently answered the question in the affirmative; see *Firm Natasingh Das* v. *G I P Railway,* (1926) I. L. R. 7 Lah. 519.

3. In construing the expression 'wilful neglect' occuring in the risk-note, their lordships quote with approval from the judgment of Lord Russell in *R.* v. *Senior* (L. R. 1899, 1 Q. B. 283), a decision on the Prevention of Cruelty to Children Act, which is obviously not a statute in *pari materia* with the Railways Act. It has, however, been held in India by almost all the High Courts that "when Acts are in *pari materia* they may be treated as forming a Code, and may be read together; but when this is not so, the construction which has been put upon one cannot be relied upon as a guide to the construction of another". [*See, inter alia, Dayachand Nemchand* v. *Hemchand Dharamchand*, (1880) I. L. R 4 Bom. 515 (F. B.), and *Assan* v. *Pathumma,* (1897) I. L. R. 22 Mad. 494, at pp. 502, 503 : 9 M. L. J. 37. *See* also Lord Halsbury's Laws of England, Vol 27, pp. 138, 139.]—K. J. R.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE DEVADOSS, AND MR. JUSTICE WALLACE.

Mooka Kone *alias* Vannia Kone and others ... *Appellants* in Appeal No.* 208 *of* 1922 (*Defendants Nos.* 1 *to* 3 *in O. S. Nos.* 64 *&* 21 *of* 1917 *in both*).

v.

Pichai *alias* Devendra Kone ... *Appellant in Appeals Nos.* 328 *and* 329 *of* 1922. (4*th defendant in O. S. No.* 64 *of* 1917 *and plaintiff in O. S. No.* 21 *of* 1917.)

Ammakutti *alias* Vannichi Ammal and another ... *Respondents in both.* (*Plaintiffs* 1 *and* 2 *in O. S. No.* 64 *of* 1917).

Hindu Law—Inheritance—Exclusion from—Widow of sonless divided Hindu—Exclusion of—Custom of—Proof—Onus—Quantum—Madura Ramayana Chavodi 1,000 Yadavas—Custom among—Evidence of—Nature

* Appeals Nos. 208, 328 & 329 of 1917, 8th February, 1927.

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of, required—Madura District Gazetteer—Statement of custom in—Weight due to—Custom duly proved—Rejection of, on ground of unreasonableness—Propriety.

The parties to the suit belonged to the Yadava or Shepherd community. They formed a sub-division of that sect and were known as the Madura Ramayana Chavadi 1,000 Yadavas who resided chiefly in the town of Madura and about 56 adjoining villages. It was practically admitted that the parties were Hindus, that they followed the Hindu religion, and that they were, in matters of inheritance, governed primarily by Hindu law. The question for decision was whether, in the community to which the parties belonged, there existed a custom by which the widow of a sonless divided Hindu was excluded from inheriting the property of her deceased husband by an agnate of the remotest degree.

Held, that the custom set up being in derogation of the ordinary Hindu law of inheritance, the onus of proving it lay heavily upon the party setting it up, that it was necessary for him to prove that the custom was ancient, invariable, continuous, and notorious, and that instances adduced in support of the custom should be established by clear and unambiguous evidence, and should be conclusive.

Held, further, that the defendants, who set up the custom, had not established it by satisfactory evidence.

Per Kumaraswami Sastri and Devadoss, JJ.—If the custom set up had been proved, it could not have been rejected as being unreasonable.

Per Kumaraswami Sastri and Wallace, JJ.—Before instances adduced in favour of the custom can be considered as proving it, there must be clear proof that those instances were instances of divided Hindus. There should be such proof as would reasonably satisfy the Court that the case cited was that of a person who was a member of a divided family.

Per Kumaraswami Sastri and Devadoss, JJ.—The statement in "the Madura District Gazetteer" as to a custom of exclution of sonless widows in the community of the parties, though deserving of great weight, ought not to be treated as being conclusive, as the custom set up in the case was different from that mentioned in it, and as the evidence in the case did not support a uniform custom set up.

Per Devadoss, J. :—Observation on the quantum of proof required in the case of custom amongst the Non-Aryan races of the Madras Presidency.

Where a custom set up is not opposed to the general law governing the community, a few instances may be sufficient to enable the Court to hold that the cusotm prevails in that community. But, where the custom which is set up is opposed to the ordinary law governing the parties, it must be shown that the custom is invariable and that it is obligatory and must be proved by a large number of instances. Where a large number of instances are proved which are not in accordance with the custom, even though the number of instances produced in support of the custom is considerably larger, the Court would hesitate a good deal before coming to the conclusion that the custom is considered by the people among whom it is said to prevail as obligatory.

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Per Wallace, J :—It is a sounder policy in such cases to put forward a reasonable number of unmistakable instances of a custom clearly and definitely proved than any number of vague and indefinite instances insufficiently established.

Proof from ancient unimpeachable documents is much more valuable than oral evidence given after the existence of the custom has become a matter of acute controvercy in the caste.

Appeals against the decrees of the Court of the Subordinate Judge of Madura in O. S. Nos. 64 and 21 of 1927.

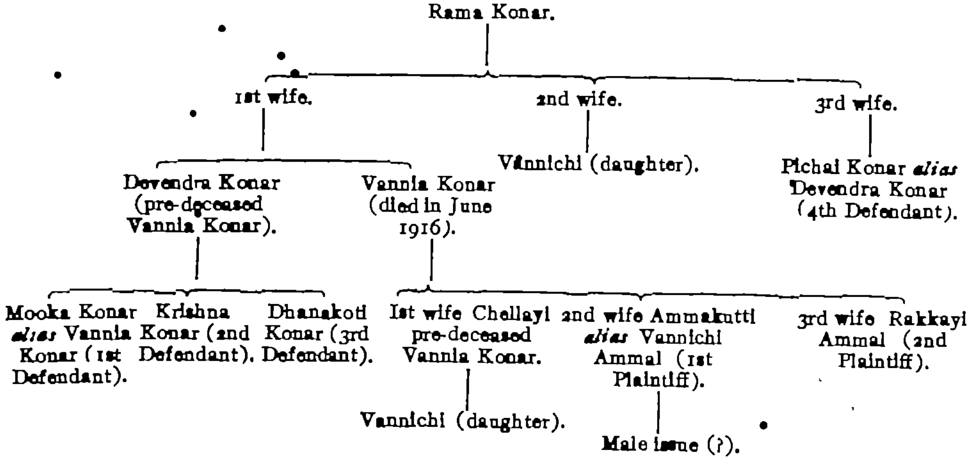
K. V. Krishnaswami Aiyar for appellants.

T. R. Ramachandra Aiyar for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENT :—*Kumaraswami Sastri, J.* :—These appeals arise out of two suits filed for the recovery of the estate of one Vannia Konar who was a member of a divided Hindu family and who died in Madura on or about the 27th of June, 1916. He left no sons and the claimants to the estate are his two surviving widows, his half-brother and his three nephews by a deceased brother. The following geneological table as to which there is no dispute sets out the relationship between the parties.



On Vannia Konar's death, his property is alleged to have been taken possession of by his brother's sons, Mooka Konar, Krishna Konar and Dhanakoti Konar, Defendants 1 to 3 in O. S. No. 64 of 1917. It is admitted that Vannia Konar was divided from his brothers. Under the ordinary Hindu Law, if it is applicable to the parties, his heirs would be his two surviving widows, Ammakutti and Rakkayi. It was admitted during the course of the trail that Vannichi has a male issue.

Pichai Konar who is his half-brther would, in default of any heirs of Vannia Konar, be the heir under Hindu Law as he being the nearer reversioner would exclude the sons of the deceased brother Devendra Konar. The sons of Vannia Konar's brother Devendra Konar however, claim the estate on the ground that according to the custom prevailing in the community to which the parties belong, widows and daughters are excluded from inheritance and that agnates of full-blood however remote exclude agantes of half-blood. The half-brother Pichai Konar claims the estate alleging that the widows and daughters are excluded, but, that the agnates of half-blood who are nearer in degree exclude agnates of full-blood who are more remote.

O. S. No. 21 of 1917 was filed by Pichai Konar, the half-brother of the deceased Vannia Konar, against Mooka Konar, Krishna Konar and Dhanakoti Konar, his nephews, claiming the estate of Vannia Konar on the ground that he as the nearer heir was entitled to the same to the exclusion of the Defendants who were more remote reversioners. The widows of Vannia Konar who claimed the estate as heirs under Hindu Law applied to be made parties to that suit, but, they were referred to a regular suit, and they filed O. S. No. 64 of 1917 against the half-brother and the nephews of their husband claiming possession of the estate on the ground that there was no such custom as is pleaded by the Defendants excluding widows from inheritance and that under Hindu Law they as heirs would be entitled to the estate. The Subordinate Judge found against the custom set up by the Defendants whereby the widows were excluded from inheritance and passed a decree in favour of the plaintiffs-widows. He also found against the custom pleaded by the nephews of the deceased that they, though remoter heirs, were entitled in preference to the brother of half-blood, but, in view of the decision of the Subordinate Judge that the widows were entitled to succeed, the suit filed by the half-brother O. S. No. 21 of 1917 was dismissed. Appeals Nos. 208 of 1922 and 329 of 1922 are appeals filed by the nephews of the deceased and the half-brother respectively against the decree of the Subordinate Judge in O. S. No. 64 of 1917 decreeing the widows' claim, and Appeal No. 328 of 1922 is the appeal filed by the half-brother against the decree dismissing his suit O. S. No. 21 of 1917.

The questions to be decided in these appeals are whether the custom which is set up by the Defendants in O. S. No. 64

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Kumaraswami Sastri, J.

of 1917 as to the exclusion of widows and the custom which is set up by the Defendants in O. S. No. 21 of 1917 whereby agnates of half-blood are postponed to agnates of full-bolod, even though more remote, have been proved. It will be seen that, while the brother and the nephews of Vannia Konar agree that the widows are excluded, they are in conflict as to whether the rule of Hindu Law that nearer agnates exclude agnates more remote is applicable. Both the suits were tried together, but, as there is some confusion as to what exactly is the custom which is pleaded, I think it is desirable to set out the custom which the half-brother and the nephews set up.

In the written statement in the suit filed by the widows who claimed inheritance under Hindu Law, defendants 1 to 3, who are the nephews of the deceased, in paragraph 4, state as follows :—

"The parties belong to what is known as the caste of the Thousand Yadavas. They are not governed by the strict principles of Hindu Law in very many matters such as marriages, adoption, partition, inheritance, etc., but solely by the customs and usages prevalent among them from time immemorial.

(a) One special incident regarding marriage is that a girl ought to be married to her maternal uncle's son, if there is one, whatever disparity of age or social position or wealth may exist between them. A violation of this rule entails a payment of Rs. 106-4-0 by the party breaking it and a payment of Rs. 12-8-0 and Rs. 6-4-0, respectively, by each male or female attending such marriages, and the funds so collected become caste property.

(b) Adoption is unknown to the caste and wholly forbidden as being radicallly repugnant to the customary laws of succession.

(c) Regarding partition, one remarkable feature is that it is regulated by what is known as *Patnibhagam* as distinguished from *Putrabhagam, i. e.,* the shares are determined by the number of wives and not by the number of sons for the several wives. Where a Yadava dies leaving 2 sons by the first wife and 4 sons by the second wife, the two sons by the first wife take a moiety of the inheritance with special rights of survivorship and succession between themselves and the four sons by the second wife take the other moiety with special rights among themselves, and the children by the one line do not have any

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rights in respect of the properties of the children of the other line until the other line becomes wholly extinct.

(*d*) The rules of succession obtaining among them are also very peculiar and perhaps the logical result also of the other customary incidents.

(*i*) Sonless widows possess an interest in the inheritance only to the extent of the customary allowances, namely, 99 sheep, if the owner died possessed of the same, or, at Re. 1 per sheep for every sheep that remain undelivered.

(*ii*) Agnates of the full-blood, however remote they may be, exclude all agantes of the half-blood, and the latter have besides no place in the line of inheritance until the full-blood in male line becomes wholly extinct."

The 4th Defendant in paragraph 2 of his written statement denies that the Plaintiffs are the heirs and plead the custom as follows :—

"The parties belong to Nattu Idayar *alias* Ramayana Chavadi Idayar Community and, according to long-established custom of the said caste, widows do not inherit their husbands' property, but are entitled only to a small perquisite, the succession, in the absence of a son, opening to the nearest male *dayadi*, and, according to the said custom of the caste, it is this defendant that has succeeded to the estate of the deceased, and plaintiffs, as excluded from succession, are not entitled to the plaint properties."

In suit No. 21 of 1917 which was filed by the 4th defendant in suit No. 64 against his nephews who are defendants 1 to 3 in that suit, the custom is pleaded as follows in paragraphs 6 and 7 of the plaint. Paragraph 6 runs as follows:—"Both the parties belong to the Yadhava caste of the class of Madura Ramayana Chavadi Edayars otherwise known as Nattidayars residing in and about Madura. The custom that has long been in vogue among the said community is that, in case an original ancestor dies without male issue, his widow or daughters do not succeed to his properties by right of succession. According to the custom long prevailing among the said castemen, the widows should only leave the house on receiving the *Aruppucooli* due to them, viz., 100 sheep, or, Rs. 100, in case there are no sheep, and they have no manner of right to the properties of the original ancestor." Paragraph 7 runs as follows :— "Moreover no right accrues to his daughters or their heirs by

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right of heirship in the properties of the person dying without male issue, according to the custom obtaining in the said community. If a person dies without male issue as stated above, only his brother and other near *dayadis* succeed to his properties as his heirs and claimants. This custom has been in existence for a long time." The Defendants in this suit denied the validity of the custom as stated in the plaint and pleaded the custom in paragraph 4 of their written statement which is the same as the custom they set up in the written statement in the suit filed by the widows and which, therefore, I need not repeat.

It is clear from the pleadings that both the half-brother and the nephews of the deceased agree that when a man dies issueless the estate passes to his nearest *dayadis* or agnates to the exclusion of the widow and daughter. The right of the widow is only to receive the *Aruppucooli* or *Kaimpenkur,* the amount of which is 100 sheep, or, Rs. 100, should there be no sheep to be delivered, irrespective of the value of the estate left. Nothing is said as to what the daughters get; but, the evidence adduced on behalf of the Defendants is that the daughters have to leave the father's house and go to the house of their maternal uncle, whose duty it is to get them married, and they have no claim on their father's estate even for maintenance or marriage expenses or residence. Some witnesses go to the extreme length of saying that even where there is no maternal uncle able to protect them, they have no claim to their father's estate and they should throw themselves under the protection of the King. There is nothing said about the rights of the daughters' sons who would succeed under Hindu Law in default of widow or daughters, but, having regard to the fact that the custom alleged makes the next agnate inherit and vests the estate in him, there could be no divesting and the daughters' sons are by necessary implication also excluded. The pleadings are also silent as to what is to become of the mother who would be the heir under the Hindu Law in default of widow or daughter or daughter's son. But the evidence adduced is that the mother also is excluded. In fact the witnesses state that all female relations are excluded.

As regards the *Aruppucooli,* though in the pleadings it is limited to 100 sheep or Rs. 100, irrespective of the value of the estate, the witnesses called by the defendants in the suit filed by the widows are not agreed on the fixed rule pleaded, and the amount to be given ranges from Rs. 30 to Rs. 100. Some of the documents filed also do not show that there was any inflexible

rule as to the number of sheep or the amount to be paid in default to the widow. The evidence also is that *Aruppucooli* is to be given by the *dayadis* even though the husband left no property. Some of the witnesses also state that, if a man leaves more than one widow, each widow gets 100 sheep or Rs. 100, irrespective of there being property sufficient to pay *Aruppucooli* to each widow. It is also stated that *Aruppucooli* is to be paid even though the husband was a member of a joint family. So far as *Aruppucooli* or *Kaimpenkur* is concerned, it is clear from the evidence that there is no definite rule or custom as to the amount. The Subordinate Judge deals with the evidence in paragraph 76 of his judgment. As it was conceded by the Appellants' vakil during the course of the argument that the evidence, oral and documentary, does not show any inform rule, I need not discuss the evidence on this point. The custom pleaded is in direct opposition to the rules of Hindu Law of Inheritance, for, while, under the ordinary Hindu Law, the widow, the daughter and, in their default, the daughter's sons would take the property of a sonless and divided Hindu, according to the custom set up, they are excluded in favour of agnates however remote; and, whereas, under the Hindu Law, widows and unmarried daughters would be entitled to maintenance and residence and unmarried daughters to marriage expenses out of the estate of the deceased, according to the custom set up, the widows get only 100 sheep or Rs. 100, whatever may be the magnitude of the estate of the husband, and the daughters get nothing at all. Although in this case the daughter of the deceased is not a party and any decision here would not bind her, still it is necessary to consider the position of the daughter as it is an integral part of the custom pleaded excluding the widow, and the question is whether such a custom has been proved. A number of witnesses were examined on both sides and each party has let in evidence as to instances either in support of or denying the custom. The Subordinate Judge has found against the custom. The case has been argued at very great length before us and I am of opinion that the custom has not been proved.

It is admitted that the parties belong to the Yadhava or Shepherd community. They form a subdivision of that sect and are known as the Madura Ramayana Chavadi 1,000 Yadhavas who reside chiefly in the town of Madura and about 56 adjoining villages. Though the community is known as 1,000 Yadhavas probably meaning that originally there were 1,000

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families, the evidence is that there are about 700 families now constituting the community. This community is again subdivided into three sub-sects, viz., Puthunattu Edayars, Sivikara Edayars and A. Edayars. Although all these three sub-sects go by the name of the Madura Ramayana Chavadi 1,000 Yadhavas and although they all contribute to the caste panchayat which is situate in a place called Ramayana Chavadi in Madura and although all these three sub-sects are within the jurisdiction of this caste panchayat which settles their caste affairs, inter-marriage between them is prohibited. The *Panchayat* consists of a manager called Nattamakkar and 24 Pattikars or members of the Panchayat. This community claims to belong to the larger community called the Yadhavas or the Shepherd community.

The Yadhava community or the community of cowherds and shepherds is a very ancient one and is mentioned in the great Epic Mahabharatha. In fact Sri Krishna was a member of that community. It is, however, doubtful whether the cowherds and shepherds of Southern India can claim descent from the Yadhavas of Northern India, as identity of trade or occupation can hardly be a sound basis for determining identity of stock especially where cattle and sheep breeding is an occupation not exclusively Aryan. The probability is that the Yadhavas of Southren India belong to the original Dravidian stock who, like other inhabitants of Southern India, came under the influence of the Aryan conquerors and who were absorbed into the Hindu community, though they retained some of their original customs too deep-rooted to be supplanted by Aryan influences. There can be little doubt that some of their aboriginal deities were absorbed into the Hindu Pantheon and that, in the process of assimilation which has gone on for several centuries, the original inhabitants of Southern India took their place in and subjected themselves to the laws and usages of the Aryans. In the Census Report the Yadhavas or Edayars are classed as Sudras which is the fourth sub-division of the Aryan caste system and there can be little doubt that the Yadhavas should be classed as Hindus belonging to the Sudra caste.

The question as to how far the Hindu Law as expounded in the Smritis and Commentaries is to be applied to the Dravidian and other commnutiies of Non-Aryan descent is one which has given rise to a lot of controversy. Some of the earlier Judges and Jurists thought it unreasonable to apply the Hindu Law to them, as the whole scheme of Hindu Law was based

upon religious and spiritual considerations alien to the thoughts, habits and culture of the original Dravidian inhabitants of Southern India, while others were of opinion that, in view of the centuries that have elapsed between the conquest of Southern India by the Aryans and the assimilation that has been going on, the Hindu Law should be applied except in cases where there is clear proof of custom to the contrary. I think it is too late in the day to contend that, in the case of persons professing the Hindu religion, the Hindu Law as expounded in the Smritis and Commentaries prevalent in the Province in which disputes arise should not *prima facie* govern the parties, though it will always be open to show that such Hindu Law has been either modified by custom or that particular rules have not been adopted by the community who retained in that respect their original customs.

I may point out that in the present case the parties and the witnesses give their religion as Vaishnavite, their caste as Yadhava and it is not suggested that they do not follow the Hindu religion. I may also point out that defendant's forty-sixth witness Ayya Kone who belongs to the 1,000 Yadhavas community states that at the time of the annual ceremony he would mention the names of his father, grandfather, and great-grandfather and that, when his father performed Sradh ceremonies, he used to mention the names of his ancestors. So that this community performs Sradh ceremonies to the deceased ancestors which forms an important basis in the Hindu Law of Inheritance. It is not suggested that, though the Yadhava community is a large community in Southern India and although ethnologically the sub-sect to which the parties belong, namely, the Madura Ramayanachavadi 1,000 Yadhavas, is not different from the other Yadhavas in Madura, Ramnad and Tinnevelly districts, other Yadhavas adopt the custom as to succession now set up. What is sought to be proved is that this sub-sect confined to about 700 families in the Madura Town and surrounding villages follow the rule of exclusion of females. I may state that another section of the Yadhavas tried to set up the rule of exclusion of females but this was negatived in both the lower Courts and was confirmed in the High Court in S. A. No. 1413 of 1922. There is nothing to show that the Yadhava community has its own self-contained written system of inheritance to which recourse is to be had in dealing with such questions. According to the brother's sons of the deceased (defendants 1 to 3) and the half-brother of the deceased (4th defendant), the

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Hindu Law is applicable except in so far as they say it has been modified by the custom of the caste. The 4th defendant would have it that the rule of Hindu Law that nearer agnates would exclude the ones more remote is applicable to the parties, while this is denied by defendants 1 to 3. I think it has to be presumed that the parties are governed by Hindu Law except in so far as they prove any custom which is at variance with it.

It has been held in numerous decisions, both of the High Courts and the Privy Council, that, in order to give effect to a custom which is set up and which is at variance with the ordinary Hindu Law, it should be ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy and, as regards instances in support of the custom, they should be established by clear and unambiguous evidence and must be conclusive.

In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1), their Lordships of the Privy Council at page 585 observe :

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in India but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

This case was referred to with approval by their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Sona Dero* (2). As regards the evidence being clear and conclusive and not explainable, their Lordships in that case cite with approval the decision of the Madras High Court in *Mirabivi* v. *Vellayanna* (3). The following observations of the learned Judges (Sir Charles Turner, C. J., and Hutchins, J.) will be relevant in appreciating the evidence in this case. They observe :

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's life time are not inconsistent with Muhammadan Law. There are also cases in which married daughters have

1. (1872) 14 M I A 570.
2. (1917) L R 45 I A 10 : I L R 45 C 450 : 34 M L J 48 (P C).
3. (1885) I L R 8 M 464.

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been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Muhammadan Law. Indeed, in many parts of the country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married, the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Muhammadan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much".

In *Ramkanta Das Mohapatra* v. *Shamanand Das Mohapatra* (4), where the question was whether the custom of primogeniture was proved, and it was found that, whenever the holder of an estate left more than one son, the right of the eldest son was challenged in Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled, their Lordships of the Privy Council observe :

"The evidence entirely fails, in their Lordships' opinion, to give to the alleged custom the character of certainty which is essential to its validity."

I shall refer to this case again in dealing with instances connected with proceedings in Court. In *Hurpurshad* v. *Sheo Dyal* (5), their Lordships of the Privy Council observe at page 285 :

"A custom is a rule which, in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain and reasonable and, being in derogation of the general rules of law, must be construed strictly."

In *Rama Nand* v. *Surgiani* (6), Sir John Edge, C. J., and Burkitt, J., referred to the fact that the instances which are cited to prove a custom should be instances which should not be explained otherwise than by the fact that the custom exists. Their observations at page 223 are in point. I may also refer to *Patel Vandravan Jekison* v. *Patel Manilal Chunilal* (7), where it was held by Sir Charles Sargent, C. J., and Birdwood, J., that even two cases against the custom set up which occurred several years ago and which were acquiesced in by the members of the community and not impugned in Court would be sufficient to outweigh a number of instances to the contrary and as show-

4. (1908) L R 36 I A 49 . I L R 36 C 590 : 19 M L J 238.
5. (1876) L R 3 I A 259 . 6. (1894) I L R 16 A 221.
7. (1891) I L R 16 B 470.

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ing that there was not a uniform and persistent usage moulding the custom of the caste.

Before dealing with the evidence as to instances adduced on both sides, I think certain general observations should be made in dealing with the evidence of custom in the case. We find no cases where a *dayadi* went to Court to establish his claim although in some instances the widow took her husband's property and dealt with it. Although it is said that there was a caste *Panchayat* which settled caste questions, there is no decision of any *Panchayat* which upholds the custom which is now sought to be established. There was a *Panchayat* regularly held in the Ramayanachavadi; contributions were levied from the castemen and it is not suggested that the *Panchayat* is not now functioning. If there was this invariable custom which was given effect to by the *Panchayat*, there would be something in the records of the *Panchayat* to show this. It is stated that the person in charge of the *Panchayat* records was *subpoenaed* and that he came to Court and said that he had not got the records. I find it difficult to see why steps were not taken as provided for in the Code to compel the production of the records. The *Panchayat* is a public body and the Code gives ample powers to the Court by arrest, imprisonment and attachment of property to compel the production of documents. I may also state that no *pattas* or other documents are produced to show the enjoyment of property by agnates to the exclusion of widows. Though *pattas* may not be evidence of title, they are certainly evidence as to possession, as the revenue authorities issue *pattas* to those in possession. There are also kist receipts which would show who paid the kist, but, no such receipts have been produced in any instance. The Revenue Registers could also have been produced to show who was in possession and also the mutation of names.

In dealing with the evidence, one has to bear in mind that before instances cited by the defendants can be considered as proving the custom alleged, it has to be shown that the person whose estate is in question died as a member of a divided family, as otherwsie, even under the ordinary Hindu Law, female relations would be excluded in preference to the undivided co-parceners. This is conceded by all the parties, so that the onus is on the person alleging the custom of showing by clear proof that the instance cited is the instance of a divided person. It is only in such cases that the taking of the property by the agnate would prove the exclusion of the widow or the daughter

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and this is the custom set up. There are several instances of the plaintiffs where there is nothing but the statement of a single witness to show that the instances cited refer to a person who is divided. The ordinary presumption of law is that a person is undivided, and the onus is on the party alleging it to prove division, and, if in cases where such instances can be proved by documentary evidence, for example, partition deeds, *pattas*, separate kist receipts or the separate transactions of the various members and no documents are produced, or, if in cases of oral partitions, the members of the family who divided or the widows concerned who are said to have been excluded are not, if alive, examined, and if the only evidence is the statement of a person not connected with the family or of a distant relation that the deceased was a divided member, I do not think I can hold that such instances have been proved. Although it may not be necessary to prove each instance as if that particular instance related to a suit which raised the issue of partition between the various co-parceners, I think there should be such proof as would reasonably satisfy the Court that the case which is cited is that of a person who is a member of a divided family.

As regards *Aruppucooli*, I have already stated that, according to the evidence, it was payable to all widows whether the family was divided or undivided and whether the husband had or had not property. The rate of *Aruppucooli* also was not as pleaded a uniform amount payable, and the documents show that it varied from Rs. 30 to 100. Mere proof that *Aruppucooli* was paid would not therefore by itself afford any guidance.

[His Lordship after dealing with the documentary evidence and the instances of custom proceeds as follow.]

I have now dealt with the instances which have been argued before us on both sides and I think it is clear from the instances which I have referred to above that, while the defendants have not shown any instances in Court where the custom set up was either alleged or recogined, the plaintiffs have proved that, in cases where parties went to Court, the widows were treated as the legal representatives of their husbands and decrees passed against them and no such custom as is now pleaded was set up, but, on the contrary Hindu Law of inheritance was treated as the basis on which the claims were adjudicated. It also appears that in cases where the *dayadis* could have gone to Court to assert their claim, no assertion was made. In one case the *dayadi* did not press the matter probably because the estate was

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small and in another case where the estate was fairly large the matter was compromised and the widows withdrew their application for succession certificate. The compromise proceeded on the footing that Hindu Law applied to them. There are cases where the widows conveyed properties belonging to their husbands not only to strangers, but, to members of the community, who presumably would have been aware of the custom if it existed, but, who did not choose to claim the property or interfere, even where the amount for which the property was sold was fairly large. We also find cases where widows lived in the houses of their husbands after their husbands' death. We find in one instance that *patta* was transferred in the name of the widow after her husband's death, although *pangalis* were alive who could have taken objection if the custom was in existence. Having regard to the evidence on both sides, I find it difficult to hold that the evidence adduced by the defendants as to custom satisfies the requirements which I have already referred to validate a custom that can be enforced by Courts in derogation of the ordinary law applicable.

Great reliance was placed upon a statement in the "Madura District Gazetteer" and in Dr. Thurston's book "Castes and Tribes of Southern India" that, in the community to which the parties belong, widows were excluded. We find in the "Madura District Gazetteer" the following statement :

"Among those Puthunattars an uncommon rule of inheritance is in force. A woman who has no male issue at the time of her husband's death has to return his property to his brother, father or maternal uncle, but, is allotted maintenance, the amount of which is fixed by a caste *Panchayat*."

The custom which is set up here is different from that which the defendants want to establish in this case. It is not the general custom that agnates exclude all females however remote, but, that after the husband's death, if he leaves a brother or father, the property is to go to those two persons and maintenance is to be given to the widow. The statement in the above passage that the maternal uncle is to get the property is opposed to the cusotm now set up, as cognates have no place in the custom pleaded by the defendants. There is also nothing here to show whether daughter's son is also to be excluded, if the person left a daughter's son. No doubt the statement in "the Madura District Gazetteer" deserves great weight, but, I do not think it should be taken as conclusive especially where the evidence in the case does not support a uniform custom set up.

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[His Lordship after dealing with the evidence disclosed by certain affidavits filed in the case proceeded as follows.]

It is argued by Mr. Ramachandra Aiyar that the custom set up is unreasonable inasmuch as the widow, whatever may be the property of her husband, has to leave the house on receipt of 100 sheep or Rs. 100, unmarried daughters are left destitute and dependant on the mercy of their maternal relations not even receiving maintenance till they attained age or any money for their marriage expenses and daughter's sons are totally excluded in favour of agnatic relations however remote. I do not think we can reject a custom if it is otherwise proved. It should be remembered that the position of woman in the line of heirs under Hindu Law was one of slow and laborious growth, and that in the early stages of the Aryan community woman found no place in succession. Even under the Hindu Law, the sister was till recently excluded from inheritance altogether and sister's son only came in after his rights were negatived in more than one decision. These persons who would be nearer heirs according to modern conceptions had been excluded for centuries in favour of remote kinsmen. A person looking at the Hindu Law of Inheritance from a western standpoint would probably look at it with a mixture of wonder and pity especially when he forgets that the keynote to the system of inheritance is the capacity to benefit the soul of the deceased by offering funeral oblations. It is very probable that, when the community was in a nomadic state and the sole occupation was to rear cattle and sheep, women by reason of their incapacity to carry on the occupation were excluded from inheritance, but, as time went on and the primitive occupation was no longer the source of income for several persons, as these shepherds settled down in towns and villages and acquired property and were surrounded by persons who followed the Hindu Law of Inheritance and Succession, they began to adopt the ordinary rule of Hindu Law of Inheritance. Assuming for argument's sake that in the old days there was such a custom as is now set up, it has ceased to be uniform and invariable by reason of inroads made from time to time and I think it is too late in the day to revive it especially as it seems to me to be opposed to the present day rules of equity and justice.

The evidence in my opinion shows that there have been instances both ways, but, the defendants' evidence falls far short of the standard required to prove a custom in derogation of the ordinary Hindu Law.

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In the result Appeals Nos 208 and 329 of 1922 are dismissed with costs. As regards printing costs, defendants have to pay, it will be divided between defendants 1 to 3 on one side and 4th defendant on the other.

As regards Appeal No. 328 of 1922, in view of my finding that the custom excluding widows has not been proved, it is not necessary to find whether there is a custom excluding half-brothers in favour of nephews of full blood. As the Hindu Law applies and as the deceased has left widows, daughter and daughter's son, the question raised in this suit is purely speculative and I do not see any ground for deciding which of the two sets of reversioners who have at present merely a *spes successionis* and who may not at all have any rights in the estate are entitled to precedence. I may also state that the daughter is not a party to any of these suits and no adjudication between the two sets of reversioners would be of any use when the estate opens on the death of the widows. Under these circumstances the Appeal is dismissed but without costs throughout.

Devadoss, J.

Devodoss, J.—One Vanniya Kone, a shepherd by caste, died in June 1916 leaving behind him a daughter, two wives, a half-brother and three nephews by a deceased full-brother. The half-brother has brought O. S. No. 21 of 1917 against the three nephews for possession of the property of Vannia Kone alleging that he as half-brother is entitled to inherit the properties in preference to the nephews. The nephews plead that the half-brother is not the heir, as, by the custom of the caste, the full-brother and his descendants exclude the half-brother and his descendants. The widows applied to be made parties to the suit and they were directed to bring a separte suit. They have accordingly brought O. S. No. 64 of 1917 against the three nephews and the half-brother for posession of the property alleging that they as widows are entitled to inherit to their husband under the Hindu Law in prefence to the nephews and half-brother The nephews and the half-brother resist the suit of the widows on the ground that, according to the custom governing the caste, widows without male issue have no rights of inheritance, but are only entitled to *Aruppucooli* or *Kaimpenkur* meaning widow's perquistites of 100 sheep or Rs. 100. The Subordinate Judge of Madura tried both the suits together and decreed O. S. No. 64 of 1917 and dismissed O. S. No. 21 of 1917. The nephews have preferred Appeal No. 208 of 1922 against the decree in O. S. No. 64 of 1917 and the half-

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brother has preferred Appeal No. 328 of 1922 against the decree in O. S. No. 21 of 1917 and has preferred Appeal No. 329 of 1922 against the decree in O. S. No. 64 of 1917. The appeals have been heard together as the main question raised in issue No. 1 of O. S. No. 64 of 1917 is common to them all. The issue is—

"Whether females are excluded from inheritance by the custom of the caste to which the parties belong as contended by the defendants".

A good deal of argument has been addressed to us by Mr. Ramachandra Aiyar who appears for the widows about the burden of proof of a custom opposed to the ordinary Hindu Law and about the essentials of a valid custom.

In deciding whether a certain custom relating to marriage, divorce, adoption, inheritance or succession obtains among a caste, sub-caste, class, sect or clan, the following considerations have to be borne in mind. What is ordinarily understood as Hindu Law is not the customary law of the country like the common law of England. Neither is it a statute law in the sense that some King or Legislature framed the law and enforced its acceptance by the people. The Hindu Law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing Hindus. There are several treatises on law and they are not of equal authority in all the provinces. Many of the so-called provisions of law are only moral or ethical rules for the conduct of a community which found a resting place amidst strange surroundings and amongst people differing considerably in many respects from it. The inhabitants of the southern portion of India were Dravidians of Turanian origin and not of the Aryan stock. The term "Dravidian" is applied generally to the South Indian people. The Dravidians were a highly civilized people with languages and literatures of their own long before the Christian era. Tamil was a highly cultivated language long before the Aryans came down south as is apparent from the absence of Sanskritic influence in the most ancient of the Tamil works extant. Consequently though the Aryans peacefully penetrated into the country and in course of time acquired considerable influence over the people posing as priests and gurus, yet they were not able to alter the customs and manners and mode of worship which prevailed among the people to any appreciable extent. Mayne says:

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"We also know that the influence of Brahmins or even of Aryans, among the Dravidian races of the South has been of the very slightest, at all events, until the British officials introduced their Brahmin advisers".

Mayne's Hindu Law and Usage, 8th Edition, p. 50. What little influence they really exerted over the people could be gathered from the fact that the people retained their own customs and manners and worshipped their own Gods and Goddesses. The Aryans in Southern India, instead of changing the customs and manners of the people, adopted some of their customs as their own. As the Gods and Goddesses worshipped by the Dravidians were not those of the Aryans, the latter in order to influence the people for their own benefit created a pedigree for them and made out that they were the sons and daughters of their Gods and Goddesses. As regards marriage, divorce and inheritance and social and domestic relations, the people followed their own customs, though they were willing to worship the Gods and Goddesses of the Aryans without forsaking their allegiance to their demon Gods and Goddesses; and the rules embodied in the Sanskrit Law books were never accepted by the people as the law governing their relations.

During the Hindu period there was no attempt to force upon the people any general system of law as regards social and domestic relations and inheritance and succession. History does not tell us that during the period of the Mahomedan domination the rulers interfered with the customary laws of the people. Each caste, class and clan had its own peculiar customs governing their social and domestic relations, inheritance and succession to property. After the advent of the British rule, the Judges appointed by the East India Company who were obviously ignorant of the customs and manners of the people looked for guidance to the learned men among the people in deciding questions regarding succession, inheritance, etc. The learned men or pandits naturally relied upon the rules contained in the old Sanskrit works for their opinion. As observed by Mr. Mayne,

"upon all disputed points of law the English Judges were merely mouthpieces of the Pandits who were attached to their Courts and whom they were bound to consult".

Mayne's Hindu Law, 8th edition, paragraph 40, page 43. The English Judges who gave their decisions according to the opinions of the Pandits when not opposed to natural justice came to look upon the Sanskrit works as embodying the law applicable to the people of the land; and 'a custom not in

accordance with the rules contained in the books came to be considered as an exception to the general Hindu Law.

The term "Hindu" is applied indiscriminately to all people who are not Mahomedans or Christians. The lowest castes who are outside the pale of Hinduism proper are also called Hindus. To call all the people "Hindus" and then apply the Hindu Law contained in the Sanskrit books to all of them is the natural consequence of the ignorance of those to whom the administration of Civil Justice was committed in the early part of the last century. It is now settled by a long course of decisions that the Hindu Law as understood by the Judges and the legal profession is applicable to all Hindus and a custom not in accordance with the general Hindu Law has to be proved by the party setting it up. But, in considering the proof of such a custom, the Court should not labour under the impression that the custom pleaded is a conscious departure from or variation of the Hindu Law applicable to the parties. The custom is not an exception to the general Hindu Law as if that a set of persons who were governed by the Hindu Law agreed to adopt a course of conduct in variance with the law which govrens them. The customs obtaining amongst the Non-Aryan races of this Presidency, especially among those inhabiting the Southern or Tamil Districts, have been in vogue from time immemorial. To hold such customs as exceptions to or variations of the Hindu Law is to ignore History and Ethnology; for, the Dravidians were never governed by the Hindu Law, and they adopted only some of the customs and manners of the Aryans when they wanted to imitate them. In weighing the evidence as regards any custom which is set up, the Court should consider whether the caste or sect or clan among whom it is said to prevail ever adopted wholly or only with some reservations the general body of Hindu Law and whether they ever intended to alter their customs and customary laws completely. Dr. Burnell in his introduction to the Dayavibagha, page 15, observes:

> "Custom has always been to a great extent superior to the written law in India and especially so in the South; but the Indian Jurists never attempted to record such merely human details; hence the difficulty of the law of marriage and caste usages on which questions of inheritance often depend. By custom only can the Dharma Sastra here be the rule of others than Brahmins and, even in the case of Brahmins, it is very often superseded by custom."

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The parties to the appeals are Edayars or shepherds by caste. They call themselves Yadhavas. Many of them profess to be Vaishnavites and wear their distinctive marks. Though the Madura Edayars are not Aryans, yet they have arrogated to themselves the position of the caste in which the great Avatar of Vishnu, Krishna, was born, and, consequently, have adopted the customs and religious practices and usages of the Aryans. D. W. 46 says that they perform the Shradhas and repeat the names of their ancestors during the ceremony. A mere conversion to a religion would not necessarily involve the adoption of the laws as to inheritance and succession obtaining among the adherents of that religion. As observed by Mr. Nelson in his brochure on Hindu Law entitled a 'View of the Hindu Law as administered by the High Court of Judiatcure at Madras", at page 138 :—

> "If all professed one and the same religion, that fact would not in itself warrant the supposition that all followed the same customs in respect to succession to property and the like; for, whilst nearly all the countries of Europe profess the Christian faith, each has its own peculiar laws regulating the devolution of property and other affairs."

But when the converts aim at identifying themselves with the rest, strong evidence would be needed to show that they kept their own laws relating to social relations, marriage, inheritance and succession uninfluenced by the rules of law obtaining among the adherents of the religion to which they became converts.

No hard-and-fast rule can be laid down as to how many instances are sufficient to make out a valid custom and how many exceptions to the custom set up would make the Court hold that the custom pleaded is not obligatory or invariable. Where a custom is a general one obtaining in a caste or clan composed of hundreds of families, the Court would naturally expect a large number of instances in proof of the custom, but, where the custom set up is that of a single family or a small group of families, it is unreasonable to expect a large number of instances in support of the custom. Where a large number of instances are proved which are not in accordance with the custom, even though the number of instances produced in support of the custom is considerably larger, the Court would hesitate a good deal before coming to the conclusion that the custom is considered by the people among whom it is said to prevail as obligatory. It is unnecessary in this view to consider the cases relied upon

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by Mr. Ramachandra Aiyar such as *Mirabivi* v. *Vellayanna* (3) and *Abdul Hussein Khan* v. *Sona Dero* (2).

The first question is, what is the custom that is set up? The issue, as framed,

"Whether females are excluded from inheritance by the custom of the caste to which the parties belong as contended by the defendants?",

is too wide. When the case was opened by Mr. K. V. Krishnaswami Aiyar for the 4th defendant, I asked him how he would formulate his position. He replied that women are excluded from inheritance. His statement is in keeping with the issue, but the written statements of defendants 1 to 3 and the 4th defendant do not go that length. In paragraph 2 of the 4th defendant's written statement, the custom is pleaded in the following terms : "Widows do not ihnerit their husband's property, but, are entitled only to a small perquisite, the succession, in the absence of a son, opening to the nearest male *dayadis*." Defendants 1, 2 and 3 plead in paragraph 4 "Sonless widows possess an interest in the inheritance only to the extent of the customary allowances, namely, 99 sheep if the owner died possessed of the same, or, at Re. 1 per sheep for every sheep that remains undelivered."

We cannot consider the custom with reference to the right of a mother to succeed to her son dying leaving no widow or issue, or the right of a daughter to the estate of a father dying without male issue or the right of a grandson by a daughter in the absence of male issue to inherit to the maternal grandfather, as they are not before us; and the question has not been definitely raised with reference to them, though witnesses in their anxiety to make out the defendants' case are prepared to go the length of saying that, if a man dies without male issue, his estate immediately vests in his agnates. The custom for determination in this case should only be confined to that set out in paragraph 2 of the written statement of the 4th defendant, namely, widows do not inherit their husband's property but are entitled only to a small perquisite.

It is urged by Mr. Ramachandra Aiyar that a finding that widows do not inherit to their husbands dying without male issue would necessarily mean the vesting of the property in the nearest agnate and that would prejudice the right of a daughter to inherit to a father and the right of the daughter's son to inherit to the grandfather, for, property must vest in somebody

2. (1917) L R 45 I A 10 : I L R 45 C 450 : 34 M L J 48 (P C).
3. (1885) I L R 8 M 464.

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and if it vests in the agnate, it cannot be subsequently divested in favour of the daughter or of the daughter's son. A finding on the custom need not necessarily prejudice the right of the daughter or daughter's son, as it is confined only to the right of the widow to inherit to her husband.

It is next urged that the custom is an unreasonable one. Nothing is unreasonable in a custom which places widows under a disability to inherit to their deceased husbands. In considering whether a custom is reasonable or unreasonable, we should not be influenced or guided by modern ideas, for, that which appears to be unreasonable to us now may have been considered as eminently reasonable and necessary for the growth or well-being of a caste or clan in bygone ages. In ancient times women were considered as chattel and therefore not fit to own property in their own right. Even Manu who gives women the right of inheritance in certain cases places them under a perpetual tutelage:

> "In childhood must a female be dependent on her father; in youth on her husband; her lord being dead, on her sons; if she have no sons, on the near kinsemen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign; a woman must never seek independence"

Manu, Chapter 5, verse 148. It is only in recent times that women were considered fit to own property in their own right. The right to inherit to male relations is a still more modern development of the law. The earliest recorded instance of daughters claiming a share for themselves in their father's property is that of the daughters of Zelophehad who applied to the great Law-giver Moses to be allowed to succeed to their father who died leaving no sons on the ground that his name should not "be done away from among his family, because he has no son." Moses allowed them to take their father's property and decreed

> "If a man die and have no son, then he shall cause inheritance to pass unto his daughter . . . and it shall be unto the children of Israel a statute of judgment."

The Book of Numbers, chapter 27, verses 4 and 8. This became "law" in Israel. Everafter that in the absence of sons, the daughters divided their father's property among themselves. Under the Mahomedan Law a mother and wife are given definite shares and a daughter is a residuary and a sister is a sharer or a residuary according to circumstances. Till the passing of the Married Women's Property Act of 1884

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a married woman could not own separate property in England. According to the Mitakshara, a sister is not an heir at all, though she is an heir in the Bombay Presidency under the Mayukha Law. So, there is nothing unreasonable in a custom which prohibits a wife from inheriting to her husband. If we apply the present day notions to some of the rules of Hindu Law, we should certainly condemn them as unreasonable and unsuited to modern conditions, but, as they are binding on the people, Courts are bound to recognize them and to give effect to them.

The parties to the appeals are a subdivision of Shepherds called Puthunattu Edayars or Ramayana Chavadi Yadhavas. They are also called One thousand Shepherds and they number about 700 families. The custom by which sonless widows are excluded from inheritance is said to obtain among this Ramayana Chavadi Yadhavas. In giving evidence, the defendants' witnesses depose that the widows get what is known as *Aruppucooli* or *Kaimpenkur* of 100 sheep or 100 rupees and quit the house of their husbands. If the payment of *Kaimpenkur* or *Aruppucooli* is a part and parcel of the custom which excludes widows from their husband's inheritance, I may say at once that the custom has not been made out; for, the evidence as to the amount, time and mode of payment of *Aruppucooli* is so conflicting and unsatisfactory that it is not possible to arrive at any definite decision as to its amount or the time or mode of payment. Even though the witnesses treat the payment of *Aruppucooli* as part of the custom and inseparable from the portion relating to the exclusion of the widows from inheritance, yet, as the defendants should not be made to suffer on account of the attempt of the witnesses to prove too much, I addressed myself to the simple question, have the defendants made out by reliable and unambigous evidence a custom, which is invariable and obligatory, whereby widows are debarred from inheriting their husband's property? The appellants seek to establish the custom by adducing a number of instances in which the property of a person dying without male issue was inherited not by the widows but by the agnates or *pangalis*. The instances may be roughly classified under the following heads:—

I. Instances supported by documentary evidence.
II. Instances spoken to by widows.
III. Instances spoken to by *pangalis* or agnates of the dsceased persons.

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IV. Instances spoken to by the widows' relations.

V. Instances spoken to by other relations.

[Then His Lordships discusses seriatim the evidence regarding the various instances spoken to by the witnesses.]

The cases in which there is satisfactory evidence that the *dayadis* or *pangalis* inherited their divided *pangali's* properties in preference to the widows are only fifteen. The cases in which there is satisfactory evidence that the widows dealt with the properties of their husbands are thirteen. It is strongly urged by Mr. Ramachandra Aiyar for the respondents that the appellants have not produced a single *patta* to show that the *patta* which stood in the name of the deceased *pangali* was transferred after his death to the name of a divided *pangali*. Nor is there any evidence to show that a divided *pangali* was brought on the record as the legal representative of a Kone in any suit or legal proceeding. It is significant that no person who had occassion to file a suit against a Yadhava of the Ramayana Chavadi subdivision ever thought of making the *pangali* the legal representative of the deceased Kone. In the case of persons who do not belong to the community, it might be said that they were not aware of the custom prevailing in the community, but, when we find that the members of the community sued either the widows or made the widows the legal representatives of a deceased Yadhava defendant, it cannot be said that the members of the community considered that there was a binding custom which prevented the widows from succeeding to their deceased husbands' properties. It is also urged for the respondents that no *Panchayat* award was produced. Exhibits XXV and XXVI make the *Panchayat* award the basis of the payment of *Arruppucooli*. Yet no *panchayat* award has been produceed by the Appellants. There is no instance of a *pangali* having enforced his right in a court of law. But there are at least two instances in which the widows applied for succession certificate to collect the outstandings due to their husbands.

The appellants naturally rely upon the admissions made by the plaintiffs' witnesses in support of their case. Mr. Ramachandra Aiyar explains the fact that some of the plaintiffs' witnesses made statements supporting the contention of the defendants by urging that they were adverse to the plaintiffs and they had to be called in order to prove certain documents and that they in cross-examination made statements supporting

the cases of the defendants. This explanation appears to be plausible.

[Then His Lordship discusses the statements in certain affidavits filed in the case.]

As I have already observed the evidence as to *Aruppucooli* is not uniform. Ex. XXIII gives it as Rs. 70, Ex. II gives it as Rs. 100, Ex. XXII as Rs. 100 and Ex. IX as Rs. 70, Ex. V as Rs. 17. The witnesses are not agreed as to the amount which is due as *Aruppucooli*. The contention of the defendants is that only Rs. 100 is paid as *Aruppucooli*. Some of the witnesses say 50 or 60 sheep and in one case 99 sheep were given as *Aruppucooli*. If the *Aruppucooli* was only Rs. 100, it is difficult to see how 99 sheep could have been given. A sheep would have been worth at least Rs. 5 to Rs. 7 some years ago. The evidence as regards the quantum of *Aruppucooli* is so conflicting that it would not be possible to accept the statement that Rs. 100 was the amount of *Aruppucooli* that should be paid by a *pangali* before he inherits the property of the deceased *pangali* and, therefore, if the *Aruppucooli* is an integral part of the custom set up, it can be safely said that the custom has not been made out. But, as I have dealt with the custom, apart from the *Aruppucooli*, only the evidence as regards the exclusion of the widows from inheritance should be considered in weighing the evidence whether the custom set up has been made out or not. The appellants place reliance upon a statement in the "Madura Gezetteer" as supporting their contention. The passage is as follows :—

"Among these Puthunattus an uncommon rule of inheritance is in force. A woman who has no male issue at the time of her husband's death has to return his property to his brother, father or maternal uncle, but, is allotted maintenance, the amount of which is fixed by a caste *Panchayat*."

The custom that is now set up is different from the custom that is referred to in the Gazetteer. According to the Gazetteer, the property has to return to the deceased's brother, father or maternal uncle and the amount of maintenance is to be fixed by the caste *Panchayat*. The defendants stoutly repudiate the suggestion that the caste *Panchayat* determines the amount of maintenance, and their case is that the *pangali* alone inherits the property, and in no case does the maternal uncle take the property. The custom which is pleaded now is not the same as that referred to in the Gazetteer and therefore the

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statement in the Gazetteer cannot be relied upon as supporting the case of the defendants.

There are about fifteen insances in which there is satisfactory evidence that the divided *pangalis* or *dayadis* succeeded to the estate of a deceased person in preference to the widow. Mr. Krishnaswami Aiyar for the appellants relies upon *Palaniappa Chettiar* v. *Alagan Chetti* (8) and contends that the clear proof of a few instances is sufficient to make out a custom. It may be that where a custom set up is not opposed to the general law governing the community, a few instances may be sufficient to enable the court to hold that the custom prevails in that community. But, where the custom which is set up is opposed to the ordinary law governing the parties, it must be shown that the custom is invariable and that it is obligatory and must be proved by a large number of instances. In this case the instances referred to as being opposed to the custom are supported by documentary evidence. In several of them the *pangalis* did not come forward as legal representatives of the deceased person and in one case a *pangali* clearly stated that he was not the heir and that the widow was the legal representative—*vide* Ex. B-2. Further the widows have asserted their rights in a court of law by applying for succession certificates—vide Ex. Q. Mere statements of witnesses that such a custom exists or that such a custom is not in vogue should not be relied upon, unless such statements are supported by instances. It is urged that the witnesses are interested persons and their evidence should not be accepted. In a case like this, where the custom obtaining in a community is in issue, only the members of the community would be in a position to speak to the custom prevailing in it, and the mere fact that they are related to the defendants or that they are related to influential men in the community—Narayana Kone, D. W. 54, or B. K. Vannia Kone, D. W. 61—should not by itself be a sufficient reason for rejecting the oral testimony as false. If the evidence is sufficient to make out that the members of the community observed the custom and considered it obligatory on them and if there are no variations or departures from it, the Court would be justified in considering the custom as proved. In this case, it does not appear that the widows knew that they had no rights and accepted what was given to them by the *pangalis*. It may

8. (1921) L R 48 I A 539 : I L R 44 M 740.

be that the caste *panchayat* in many cases compelled the widows to accept cash payment and relinquish their rights to their husbands' property in favour of the *pangalis* and determined what amount should be paid as maintenance having regard to the extent and nature of the husband's estate, and that is the reason why the amount of *Aruppucooli* is different in different cases. The statement in the Gazetteer that a woman who has no male issue is allotted maintenance, the amount of which is fixed by the caste *Panchayat,* is probably correct. The defendants' witnesses do not admit that the caste *Panchayat* fixed the amount of the maintenance, as such a statement would cut at the root of the defendants' case and they are driven to the logical conclusion that, if a wealthy man dies leaving only daughters and a widow, they have to seek an asylum in the house of the widow's brother however poor he may be. They further go to the length of saying that even if there was no estate, the *pangali* was bound to pay Rs. 100 to the widow. The Yadhavas being a polygamous people, if the custom is a binding one, a poor *pangali* who may not get a pie of the deceased *pangali's* estate will be obliged to pay Rs. 200, if there are two widows, and more, if there are more widows. Curiously enough in many cases the deceased left two widows.

Indian Courts are Courts of law as well as of equity and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat it as unsuited to modern conditions and has allowed a departure from it in several cases. When a custom which is not in accordance with the ordinary law governing the Hindu community is giving way to enlightenment in order to bring it in line with other communities, Courts would not be justified in giving effect to it and thereby compelling the unwilling community to be bound by the custom which it has practically abandoned. The judicial recognition of a custom which a community is prepared to jettison is neither necessary nor just. Even if such a custom as that set up had prevailed at some time, I am not prepared to hold that the custom has been considered to be a binding one during the last 20 or 25 years. The truth probably is that set out in Ex. XLIII (*a*), the affidavit of plaintiffs 1 and 2. In paragraph 5 they state:

"We object to the caste custom alleged by both parties. Both parties are followers of Hindu religion. All the rights

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and non-rights under the provisions of the Hindu Law are applicable to both parties and to us as well."

Paragraph 6 is as follows:

"It might be usual in some poor families to send away widows having no heir, after paying some amount with the consent of both parties".

In paragraph 7 they say:

"But in the case of rich and influential families like that of our deceased husband Vannia Konar, the widows used to manage their properties during their lifetime, and in the case of some other families they used to hand over their properties to their heirs, receive from them amounts in thousands for their expenses and do several other acts."

After careful and anxious consideration of the whole of the evidence in this case, I have not the slightest hesitation in holding that the defendants have failed to prove the custom as set up by them and I find issue No. 1 against the defendants. The result of this finding is, the appeals against the decree in O. S. No. 64 of 1917 fail and they are dismissed with costs. It is unnecessary in the view I have taken of issue No. 1 to consider the issues that arise in O. S. No. 21 of 1917. Appeal No. 328 of 1922 is also dismissed without costs throughout.

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Wallace, J. :—Appeals Nos. 208 and 329 of 1922 :—I concur with my learned brothers.

The point for decision is whether the defendants have proved a custom in derogation of Hindu Law that the agnates to the remotest degree exclude the sonless widow or widows of a deceased divided member of the 1,000 Yadhava caste community, in the matter of inheritance of his property at his death. It has not been contended before us, although it was contended in a way before the lower court, that the parties to these suits are not Hindus. They are certainly Hindu by religion. They describe themselves as Vaishnavites and do not claim that they follow any other religion. That being so, it is difficult for them to contend that they are not in the matter of family law of inheritance governed primarily by Hindu Law and in fact that has been admitted in this Court. In their pleadings also they admit that they are governed primarily by Hindu Law, but plead the suit custom, which is a cutsom in derogation of the ordinary law of succession under Hindu Law, as a custom among them having the force of law and therefore to be enforced by the Courts. The onus of proving such a custom lies heavily on the defefndants and it was necessary for them to prove that the custom alleged is

certain, uniform and ancient, and forms in the caste consciousness such a binding rule that disobedience of it will be felt by the caste as tantamount to disobedience of a positive law.

The evidence to prove the custom is voluminous and deals with a large number of separate instances, each of which had to be carefully extracted and dealt with by the trial court. This may partly account for the lower court having made many mistakes in quoting it, although there are also indications that these mistakes are due not to the Judge reading the evidence for himself but to his depending upon the vakils' notes of argument. Speaking generally, however, the evidence is not of a high order, is more conspicuous for quantity than for quality, and is vague, indefinite and inconclusive. It is a sounder policy in such cases to put forward a reasonable number of unmistakable instances of a custom clearly and definitely proved than any number of vague and indefinite instances insufficiently established.

As to what the custom pleaded really is, the defendants make an unfortunate start by not agreeing with one another. In their pleadings in the suit with which we are now concerned, *i. e.*, Original Suit No. 64 of 1917, the defendants 1 to 3 said that the custom is that "a sonless widow possesses *an interest in the inheritance* only to the extent of the customary allowances, namely, 99 sheep if the owner died possessed of the same, or at 1 rupee per sheep for every sheep that remained undelivered." The 4th defendant says the custom is that "Widows *do not inherit* their husband's property, but, are entitled only to a small perquisite, the succession, in the absence of a son, opening to the nearest male *dayadi*". In their pleadings in Original Suit No. 21 of 1917 which was tried along with this case, the present 4th defendant pleaded that the custom is that "in case an original ancestor died without male issue, his widow or daughters do not succeed to his properties by right of succession . . . The widows had only a right to receive *Aruppucooli*, namely, 100 sheep or 100 rupees in case there are no sheep and then they leave the house and have no manner of right to the properties of the original ancestor, and no right accrues to his daughters or their heirs by right of heirship in the properties of a person dying without male issue; . . . only his brother and *other near dayadis* succeed to his properties as his heirs and claimants." Defendants 1 to 3 in their defence in that suit started by denying *in toto* this custom and then set up rules of succession in the

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same words as used by them in their pleadings in the present suit. As set out by defendants 1 to 3, therefore, the custom relates only to widows. Nothing is said about mothers or daughters; and these widows have an interest in the inheritance to the extent of 99 sheep. According to the 4th defendant, the daughter as well as the widow do not succeed and neither of them has any interest in the inheritance as such. At the trial all the defendants joined forces together, and defendants 1 to 3 accepted what they had previously denied, namely, the custom pleaded by the 4th defendant. The custom put forward in the evidence adduced by them differs in several respects from that put forward in the pleadings. For example, the exclusion from inheritance previously predicated of widows and daughters only is extended also to mothers and step-mothers. The amount of *Aruppucooli* or payment due to the sonless widow is not fixed at 99 sheep or 99 rupees, but varies considerably, and the succession is not restricted to a brother or other near *dayadi,* but, any agnate however remote excludes all the above female relations. This latter extension is significant in view of the fact that defendants relied on a recital in the Madura Gazetteer to support the custom pleaded by them. Now the recital in the Gazetteer is to the effect that in this caste on the death of a man without male issue the widow has to return his property to his father, brother or maternal uncle. It seems to me obvious that the Gazetteer custom, especially in its inclusion of the maternal uncle, differs fundamentally from the custom now pleaded that all agnates however remote exclude all cognates. Again the Gazetteer does not say that widows are ever deprived of the right of residence in the family house, which is now pleaded as part of the custom, nor does it mention the exclusion of mothers or daughters or give any countenance to the custom now pleaded that daughters have no right even to a pie of their father's property, but, are turned adrift penniless on their father's death. The Gazetteer also says that the custom is that the amount of the widow's maintenance is not fixed, but, is determined by a *Panchayat.* There is no suggestion that it is limited to one lump sum payment of Rs. 100 or so.

There are many indications in the evidence, into which I need not go in detail, that there once was such a custom as set out in the Gazetteer, and my general conclusion is that the present defendants are trying to expand and extend it further than it ever really went, while, as a matter of fact, the influence

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of surrounding Hindu Law has been such that the original custom has been largely broken down, especially, as one would expect, in the main town of Madura. It is not without significance that most of the oral evidence for the plaintiffs against the existence of the custom comes from Madura Town and most of the evidence of the defendants from the outside villages.

It has been argued for the defendants that their case should not be dismissed, even if they have not succeeded in proving every detail of the custom pleaded, and that it is open to the Court to find out exactly what the custom is and give legal effect to it. That may be so in theory, but, in practice, the Court has to see whether any of the details are so satisfactorily proved that they can be accepted, and, when witnesses have obviously given exaggerated or false accounts of the custom, it is not easy to distinguish how much of their description is false or exaggerated and how much residuum of truth is left. Speaking generally, no witness for the defence supports the Gazetteer custom in giving the maternal uncle any right to the property or in stating that the amount of *Aruppucooli* is left to be fixed by a *Panchayat*, while all seem to agree that the widow has no right of residence in the family house, a point which the Gazetteer does not mention. Some of the defence witnesses go to absurd lengths about the details of the custom. Some assert that *Aruppucooli* is to be paid, even when there is no property left at all or when the property left is less than 100 sheep or 100 rupees, and that it must be so paid to each separate widow—see the evidence of D. Ws. 1, 2, 5, 46, and 57,—even if the *pangalis* are ruined thereby—see D. W. 57, also that daughters get not a pie and have to beg if there are no relations who will feed them; apparently if they are infants, they must die of starvation. Very strong proof of such an inhuman custom would have to be adduced before the Courts would accept and enforce it.

It is clear, I think, from all these considerations that the extent and the scope of the custom is by no means certain and definite. When I come to consider the value of the actual evidence adduced, I find that the residue left indicates the same uncertainty as to what the custom is. I need not go in detail into the evidence, but, will remark generally that I have rejected most of the defendants' instances on three main grounds : (1) That proof from ancient and unimpeachable documents is much more valuable than oral evidence given after the exist-

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ence of the custom has become a matter of acute controversy in the caste, each member of which will be probably affected one way or the other by the decision. Of such ancient and unimpeachable documents there are none on the defendants' side. (2) That the proof that a deceased husband was divided from his *pangalis* was in most instances insufficient, unsatisfactory or not the best obtainanble. Obviously the essential preliminary fact of division had to be established by the best possible evidence and, if it is not so established, the instance is useless, as, when there is no division, the widow would under Hindu Law not succeed to the property as against the undivided *dayadi*, and the non-succession of the widow would be in accordance with the ordinary Hindu Law. (3) That evidence as to exclusion of mothers, step-mothers and daughters is not relevant to the case of widows, since, by the pleadings in this case as distinct from the pleadings in Original Suit No. 21 to which the present Plaintiffs are not parties, no plea of the exclusion of mother, step-mother or daughter was put forward and, therefore, the plaintiffs were not called upon to meet such a case. Plaintiffs' husband in fact has left a daughter and a daughter's son, and, if the defendants wishehd to establish the custom as against the daughter, they should have made the daughter also a party to the suit.

We have had each instance on each side carefully put before us and citicised by the other side and my general conclusion is that on the defendants' side I accept as satisfactorily proved only seven instances, Nos. 3, 4 and 12 in paragraph 60 of the lower court's judgment, Nos. 8, 9 and 15 in paragraph 62 and No. 13 in paragraph 68. Instance No. 4 in paragraph 60 sets out a partition deed, Exhibit I, which recites payment of *Aruppucooli* to the widow and her exclusion from the husband's property. This is, however, of a recent date, only four years prior to the suit. Instance No. 3, paragraph 60, has some significance, inasmuch as there a father of a widow took a transfer of the husband's property from the *pangali*. See Exhibits XXI and XXI (*a*), dated 1900. Instance No. 12, paragraph 60, is also a case where the widow herself took a mortgage of her husband's property from the *pangali*, a case of 1899. The other instances are not supported by documents, but, seem to me fairly proved as cases in which a *pangali* excluded the widow from the property. On the other hand there are many infirmative circumstances weakening the defendants' case. In a community of 700 families, one expects a certain number of docu-

mentary transfers of property; yet, the defendants have not not been able to prove satisfactorily any such transfer earlier than 1899, which is only 17 years before the suit. One expects also a certain amount of litigation, at least by creditors for recovery of the debts of a deceased man or by claimants of his property, but, the defendants have not put forward a single instance in which *dayadis* have been sued as legal representatives of the deceased husband. There is no recorded case in which a widow has ever been put by a *dayadi* to the test of a law court, no case in which they applied for and got a succession certificate, no documentary proof of a transfer of *patta* of the deceased's land to *dayadis*, no proof of payment of *kist* by a *dayadi* for land primarily owned by the husband, no award of any caste *panchayat* on the lines of the alleged custom.

[His Lordship then discusses the evidence relating to the various instances.]

Reliance was also placed by the defence on the fact that P. Ws. 5, 6, 7, 11 and 12 have given affidavits, Exhibits XXXVIII, XL to XLIII. These were put in in an I. A. in O. S. No. 21 which is a contest between the 4th defendant on the one hand and defendants 1 to 3 on the other as to whether the inheritance from a sonless Yadhava goes to his brother by the same mother or not. The affidavits were put in in support of the claim by defendants 1 to 3. The question whether the widow was excluded by the *dayadis* was not then in point and any assertion on it can only be inferred, if at all, indirectly from the statement in paragraph 7 of the affidavits that defendants 1 to 3 had succeeded to the estate of Vannia Kone.

Such is the state of the evidence as I find it to be in this case. Regarding it as a whole and remembering that the onus of proving a custom derogatory to Hindu Law lies heavily on the defendants, I am satisfied that they have not discharged it. The custom mentioned in the Gazetteer is not the custom set out in the pleadings. The custom set out in the pleadings of defendants 1 to 3 is not the custom set out in the pleadings of the 4th defendant. The custom set out in the pleadings by all defendants is widely expanded and carried to absurd lengths in the evidence. The few instances which defendants have proved of *dayadis* excluding widows are to my mind wholly insufficient to establish that any clear, uniform, ancient and definite custom contrary to the ordinary

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Hindu Law and having the force of law governs the consciousness and the social life of this caste. As I have indicated, there may at one time have been a custom, such as is set out in the Gazetteer, which is now in a state of flux and erosion owing to the inroads of Hindu Law. It is easier to conceive that there was once such a custom which has now fallen very much into desuetude owing to the influence of Hindu Law than that a definite custom was set up in defiance of Hindu Law by persons originally subject in this matter to the full canon of Hindu Law. I am unable to conclude that there is now in vogue any custom, such as the defendants contend for, having the force of law so that the community regard it as law and a breach of it as a breach of the law. I, therefore, agree with the lower Court and with my learned brothers that this custom has not been proved, that the defence to the plaintiffs' claims fails, and that the appeals should be dismissed with costs, as provided for in my learned brothers' judgment.

Appeal No. 328 of 1922 :—I agree here also with the order in this appeal.

A. S. V. *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA AND SIR JOHN WALLIS.

Seth Maganmal, since deceased, and another ... *Appellants** (*Plaintiffs*).

v.

Darbarilal Chowdhry ... *Respondent* (*Defendant*).

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Weight attaching to findings of fact of Trial Court which had not seen the witnesses—Suit to enforce mortgage—Onus on defendant who denies receipt of consideration—Presumption to detriment of party failing to produce his principal witness—Indian Contract Act, 1872, S. 23—Creditor obtaining guarantee from third party by stifling a prosecution.

Where in a case which entirely depends upon questions of fact, the Judge of the Trial Court pronounces judgment merely upon the record of evidence made by his predecessor-in-office and has not had the benefit of seeing the witnesses give their evidence, and the Appellate Court, on the same evidence, comes to the opposite conclusion as to the facts, their Lordships of the Judicial Committee will not attach the same

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*P. C. Appeal No. 58 of 1924. 6th December, 1927.

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importance as they otherwise would to the findings of fact of the Trial Court, and will be slow to disturb the judgment of the Appellate Court unless convinced that it is wrong.

In a suit to enforce a registered mortgage-bond, the plaintiff alleged that the defendant executed the mortgage in question after having received the consideration money in cash. The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiff. *Held,* that the onus lay heavily on the defendant to prove this defence which was admittedly inconsistent with his own admissions in writing. *Held,* also, on the evidence, that the defendant had in this case discharged the onus which rested upon him.

Where a party failed to call as his witness the principal person involved in the transaction, who was in a position to give a first hand account of the matters in controversy and to throw light on them, and who could have refuted on oath the allegations of the other side, and the Appellate Court drew an inference adverse to the party who thus intentionally kept back his principal witness, their Lordships of the Privy Council considered that it was, under the circumstances, a legitimate inference to draw.

The question whether a creditor can by stifling a prosecution for a non-compoundable offence obtain a valid guarantee for his debt from a third party, was left open by the Judicial Committee.

Appeal (No. 58 of 1924) from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces (Dhobley, A. J. C.), dated the 21st December, 1921, reversing a judgment and decree of the Subordinate Judge of Damoh, dated the 17th November, 1919.

The suit was brought by the plaintiffs-appellants to enforce a mortgage, dated the 5th March, 1913, and executed by the defendant-respondent in their father's favour, and the main question for determination in the appeal to their Lordships was, whether the said mortgage was given for valuable consideration or whether it was given, as alleged by the defendant, without any valuable consideration but "for the purpose of compounding a non-compoundable offence committed by Gajadhar, brother of the defendant".

The material facts of the case are given in their Lordships' judgment.

The Trial Court disbelieved the defence and found for the plaintiffs and made a decree in their favour, and from that decree the defendant appealed to the Court of the Judicial Commissioner, Central Provinces.

The appeal was heard by Rao Bahadur Dhobley, Additional Judicial Commissioner. He came to the opposite conclusion, and held that the defendant was threatened with

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a prosecution of his brother for the offence of embezzlement which was not compoundable, and that the mortgage was therefore invalid and unenforceable. He accordingly allowed the defendant's appeal, and made a decree dismissing the plaintiffs' claim.

The learned Judicial Commissioner's judgment on the question of law involved was as follows:

"The next question is whether on these facts the defendant is liable on the mortgage in suit. On his behalf, it is contended that the consideration for the mortgage was illegal, while it is urged for the plaintiffs that the defendant having accepted his brother's liability must satisfy it. The argument is that there was a civil liability on Gajadhar to make up the deficiency and that the defendant merely undertook that responsibility in consequence of which the plaintiffs released Gajadhar. That was said to be a good, valid and enforceable consideration. Whether Gajadhar was or was not guilty of the offence of criminal breach of trust, or whether he would have, on being prosecuted, been convicted of the offence or not, is not very material. The fact is that he was threatened with a prosecution for that offence, which was not compoundable. The law on the subject is laid down in the case of *Kishanlal* v. *Amansingh* (1), and it is to the effect that a mere adjustment by compromise of the private damage caused to a person by an offence, which leaves inviolate the public right to prosecute, is valid and enforceable in the Civil Court, but that every agreement to stifle a prosecution for a non-compoundable offence is based upon illegal consideration and is therefore void. In the present case though there was no express agreement made by Rai Saheb Sukhdeo not to prosecute Gajadhar, such agreement can be inferred from the threat that, unless the defendant gave the mortgage bond, Gajadhar would be prosecuted. The defendant was not in any way liable to the plaintiffs and the consideration which prompted him to give the mortgage was to avoid Gajadhar's prosecution. As observed in *Flower* v. *Sadler* (2), there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. In the present case an agreement that there should be no prosecution must be implied. The defendant in giving the mortgage to the plaintiffs was actuated by the desire to prevent his brother's prosecution. The creditor cannot by stifling a prosecution obtain a guarantee for his debt from third parties : *Kessowji* v. *Hurjivan* (3). My opinion is that the mortgage bond in suit is unenforceable and that the plaintiffs cannot obtain any decree on it".

De Gruyther, K. C. and *Pariksh* for appellants.

Dube for respondent.

De Gruyther, K. C. The mortgage in suit is not illegal. Refers to S. 23, Indian Contract Act, 1872. Illustration (*h*) to the section deals with this class of cases.

1. (1911) 8 N L R 97.
2. (1882) L R 10 Q B D 572, at p. 576.
3. (1887) I L R 11 B 566.

The following cases on stifling a prosecution were cited: *Kessowji* v. *Hurjivan* (3), *Flower* v. *Sadler* (2), *Ward* v. *Lloyd* (4) and *Kishanlal* v. *Amansingh* (1), decided in the year 1911.

Dube:—The offence of criminal breach of trust is not compoundable.

(*Lord Sinha*:—If the books show falsification, that is proof of defalcation).

(*Sir John Wallis* :—Is'nt compounding a felony an offence under the Penal Code?).

Yes, it is.

(*Lord Sumner* :—In a case like this, where neither Court below has heard the witnesses, our duty is to try and unravel the truth.)

Dube cites *Lal Kunwar* v. *Chiranji Lal* (5), and relies on the observations of Lord Atkinson there as regards the presumption to be made against a party who does not give evidence, though he is the principal witness in the case. It is apparent that Rai Sahib Sukhdeo was a very important witness for the plaintiff. He was summoned to give evidence, but he evaded it.

(*Sir John Wallis* :—These people in India sometimes do not like going in the witness-box. I know a man there proving his good character by saying that he has never been a witness in his life).

Their Lordships' judgment was delivered by

Lord Sinha.

LORD SINHA :—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces, which reversed a judgment and decree of the Subordinate Judge of Damoh in a suit which was filed on the 11th December, 1916, in order to enforce a mortgage executed by the defendant on the 5th March, 1913.

The case has been tried under peculiarly unsatisfactory circumstances. The plaint was registered on the 2nd January, 1917. No written statement was filed, but only oral statements of the pleaders on both sides recorded, and issues were framed on these. The evidence was heard from time to time and at long intervals, and appears to have taken altogether a period of nearly three years. Judgment was pronounced by a Subordinate Judge who had not heard any

1. (1911) 8 N L R 97. 2. (1882) L R 10 Q B D 572.
3. (1887) I L R 11 B 566. 4. 7 Scott N. Rep. 499.
5. (1909) L R 37 I A 1 : I L R 32 A 104 : 20 M L J 182 (P C).

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of the witnesses except two, and even of these one had been partly examined by his predecessor in office The result is that in a case which entirely depends upon questions of fact, neither of the Courts dealing with the case had the benefit of seeing the witnesses and had to appreciate the evidence recorded by another Judge. Under these circumstances their Lordships are unable to attach the same importance as they otherwise would to the findings of fact of the Trial Court, and it is necessary that they should feel convinced that the judgment of the Judicial Commissioner under appeal is wrong before they can advise that it should be set aside.

The plaintiffs alleged that the defendant executed the mortgage in question after having received the sum of Rs. 7,000 in cash, and they prayed for the usual mortgage decree.

The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiffs.

It is obvious that the onus of proving this defence lay on him, and lay heavily, seeing that it is inconsistent with his own admissions in writing hereafter referred to. It is necessary to scrutinise the defence story in detail and to see whether it is corroborated in every material part in such a way as to neutralise the effect of these admissions. For that purpose, such of the main facts as are not in dispute may be stated as follows:—

The plaintiffs have their principal shop at Damoh, which is called "Badi Dukan." Rai Seth Sukhdeo was its Munim. The plaintiffs had also a branch shop in the Mawganj quarter of that town, doing only grain business. It was usually called the "Adat shop". In that shop the defendant's brother, Gajadhar, was the managing partner without any share in the capital. In the Paki Rokad (fair cash book) of the Adat shop there are three debit entries in the handwriting of Gajadhar showing that the following sums had been advanced to the defendant on the dates mentioned against them:—

(1) Rs. 2,600, dated 13th February, 1913.
(2) Rs. 3,400, dated 12th February, 1913.
(3) Rs. 1,000, dated 17th February, 1913.

Total Rs. 7,000

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The *Sarkat* or acknowledgment book of that shop contains acknowledgments of the defendant in his own handwriting purporting to have been written on these dates and admitting these loans.

The plaintiffs alleged that the defendant had borrowed from their Badi Dukan Rs. 7,000, and given the mortgage in suit in order to satisfy the debts due by him to the Adat shop as evidenced by the above documents. What the defendant had to say with reference to these facts will be apparent from the following statement made for him by his pleader on the 5th December, 1917 :—

"A few days before the execution of the bond in suit, Gajadhar had gone to Jubbulpore in connection with the defendant's marriage. During his absence Rai Sahib Seth Sukhdeo found some money short in the Adat shop and wired to Gajadhar to come back. When Gajadhar came, he was threatened by Rai Sahib Sukhdeo with prosecution and arrest for the alleged defalcation. As Rai Sahib Sukhdeo holds the position of an Honorary Magistrate and is an influential man, and as Gajadhar was the only person of the defendant's family to arrange for the marriage of the defendant, the defendant in order to avoid the threatened prosecution of his brother executed a *sarkat* for Rs. 7,000 in favour of Badi Dukan as required by Rai Sahib Sukhdeo. (The Judicial Commissioner states in his judgment that the words Badi Dukan appear to be a clerical mistake. It should have been Adat shop.) In order to give a colouring of truth Rai Sahib Sukhdeo coerced the defendant into showing in the *sarkat* that the amount of Rs. 7,000 was taken on three different dates. None of these items was taken as a loan. The amount of defalcation was said to be Rs. 7,000. By executing the *sarkat* the defendant avoided complications during his marriage. On return of the marriage party the said Munim again threatened the defendant that he would prosecute unless a mortgage deed for Rs. 7,000 was given, as there was no security for the *sarkat* debt. The defendant subsequently learnt that there was no shortage of money in the Adat shop. The bond is therefore void for want of consideration and also because it was executed under undue influence, coercion and for stifling prosecution for a non-compoundable offence.

This story is entirely denied by the plaintiffs, and it is their case that the three loans in February were actually advanced from the till of the Adat shop by Gajadhar to the defendant on the three different dates as shown in its books.

The real question, therefore, is whether the defendant had in fact borrowed from the Adat shop those three sums of money, amounting to Rs. 7,000, for the satisfaction of which the mortgage is said to have been executed. The Judicial Commissioner considered that the mere fact of the actual payment before the registering officer or the ultimate removal of the money to the Badi Dukan did not affect the

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question as the consideration of the mortgage bond was intended to satisfy the defendant's liability to the *Adat* shop. The crucial question is the defendant's antecedent liability to the Adat shop.

The defendant and his brother, Gajadhar, denied that any such advance was made, and, though the Trial Court did not believe their story, the Judicial Commissioner came to the conclusion that no cash loans were taken by the defendant from the Adat shop, and that the acknowledgments in the sarkat-book and the entries in the Pakki Rokad were made under the circumstances spoken to by them. He considered that their evidence received material corroboration from the following circumstances:—

(*a*) A telegram, dated the 14th February, 1913 (Ex. D. 1), from Damoh, addressed to Gajadhar at Jubbulpore, to prove that Gajadhar was not at Damoh on the 14th February.

(*b*) The non-production by the plaintiffs of the Katchi Rokad (or rough cash book) of the Adat shop for 1913, which would be the best evidence of the transactions in that month as it would contain entries made from day to day.

(*c*) The fact that though all the account books were written by subordinate clerks, the only entries in the Pakki Rokad (or fair cash book), which was written up at varying intervals from the Katchi Rokad, which were in the handwriting of Gajadhar, were under the dates 13th to the 17th February.

(*d*) The failure of the plaintiffs to call the Munim Sukhdeo, who died before the hearing was actually concluded, but who could have been called on several previous dates when the case was heard, and

(*e*) The evidence of several witnesses which proved that some credit entries in their names were falsely made after the 17th February in the Pakki Rokad of the Adat shop to square up corresponding debit entries which were equally fictitious and which had been made before the 17th February in order to cover up defalcations or deficits, whether Gajadhar was himself guilty of the same or not.

It was argued before their Lordships that none of the circumstances above related either singly or taken together justified the Judicial Commissioner in accepting the defendant's story.

Taking the telegram first, it purports to be sent by Nathoolal, is addressed to Gajadhar c|o Kodoolal Dasratlal,

Jubbulpore, and is despatched from Damoh at 8.25 p. m. The contents are as follows:—

"Come by first train soon."

Nathoolal, examined as a witness on behalf of the defendant, stated that the Munim Sukhdeo sent for him in Magh, 1968 (February, 1913), and asked for Gajadhar's address at Jubbulpore, he having left Damoh a day or two before, that he gave the address and thereupon the Munim sent a telegram (to Gajadhar) through his man, but he did not know its contents. Gajadhar deposed that Ex. D. I was the telegram he received. He had gone into the interior of the district when the telegram was received by his relative to whose care it was addressed. He got it on his return from the interior to Jubbulpore, and he immediately returned to Damoh, which he reached on the 17th or 18th February. The Judicial Commissioner came to the conclusion that Gajadhar was not at Damoh on the 14th February, 1913, and that the evidence of the plaintiffs' witnesses that the three different sums of money were actually advanced by Gajadhar to the defendant on the dates shown in the account books could not be accepted.

It is urged on behalf of the plaintiffs (appellants) that even though the telegram was sent on the 14th February, Gajadhar might have been at Damoh during business hours on that date, as the telegram was not despatched till 8.25 p. m. This depends on the distance between the two places, Damoh and Jubbulpore, and the times of the train service between them. That argument was apparently not urged, either before the Subordinate Judge or the Judicial Commissioner, both of whom were in a better position to deal with it than their Lordships, who are, therefore, unable to hold that the Judicial Commissioner was wrong in holding that the telegram was conclusive to show that Gajadhar was not at Damoh on the 14th February.

It would further appear that the entry of the 17th February is equally fictitious, even if it is assumed that Gajadhar returned to Jubbulpore on the 17th and not on the 18th. The telegram purporting to come as it did from Nathoolal, an employee of the Adat shop, was as an urgent summons to return and could not but convey that something serious had occurred in connection with the Adat shop, and it is difficult to believe that on the very day Gajadhar returned to Damoh he should lend a further sum of Rs. 1,000 to his brother, and

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thereby commit another grave irregularity in connection with the cash of the shop—for such it was alleged to be by evidence on the plaintiffs' side.

The next question to consider are the facts mentioned as (*b*) and (*c*) above.

As regards the Katchi Rokad, this is what the Judicial Commissioner says:—

"Pakki Rokad is not written from day to day, but is written at the convenience of the clerks when they get time. It is the Katchi Rokad in which transactions are entered at the very time. These are copied in the Pakki Rokad afterwards at the convenience of the clerks. It is therefore the Katchi Rokad which is the really important document. If these amounts were really advanced in cash to the defendant, as was the plaintiffs' case, they must have found place in the Katchi Rokad. Though the defendant had made determined efforts to get the plaintiffs to produce the Katchi Rokads of the Adat shop, they failed to produce them. No satisfactory explanation was given for their non-production, and the plaintiffs merely made a bald statement they had not got any Katchi Rokad of that shop. It was never alleged by the plaintiffs that Gajadhar had removed them. Rampal's evidence given as D. W. 9, to the effect that the Katchi Rokads of the Adat shop were with Gajadhar cannot, therefore, be believed. Gajadhar had already been divested of all his powers over the Adat shop, and it seems very unlikely that he would have been permitted to retain these books or to remove them. From hearing to hearing the defendant was pressing for the production of the Katchi Rokads and still no suggestion was made on behalf of the plaintiffs till Rampal was examined that these had been taken away by Gajadhar".

Similarly as regards the entries in the Pakki Rokad, the Judicial Commissioner observes:—

"There is one very important circumstance for which no explanation has been offered for the plaintiffs. All the account books were written by subordinate clerks. On no other days were any account books of the Adat shop written by Gajadhar. It was only the Pakki Rokad of 13th February, 1913, to 17th February, that was written by Gajadhar. Gajadhar swears that he had gone through the whole of the Pakki Rokad for that year and that on no other date were any entries made by him. This has not been denied by the plaintiffs. This extraordinary circumstance of Gajadhar writing Pakki Rokad only on these particular dates could not have been a mere accident. It was apparently done with the sole object of preventing the defendant from subsequently denying his liability for these items. The plaintiffs' Munim was, it appears, taking all possible precautions to cover the real nature of the debits and to give them an appearance of ordinary loan transactions which the defendant may not subsequently deny, otherwise there was no meaning in Gajadhar writing the Pakki Rokad only on these four days."

Their Lordships are unable to hold that the Judicial Commissioner was wrong when he says with reference to the above as follows:—

"The fair conclusion to be drawn from these circumstances is that the Katchi Rokads of the Adat shop were intentionally suppressed by the plaintiffs, and that their production in Court would have gone against them. The entries in the Pakhi Rokad of these particular dates were made by Gajadhar after his return from Jubbulpore. These circumstances support the defendant's allegation that they were all made on one day. Gajadhar's statement that different dates against the different items debited to the defendant were put in order to ward off suspicion cannot be said to be without any foundation."

As regards (*d*) the Judicial Commissioner says:—

"The absence of the evidence of Rai Sahib Sukhdeo in the case is also remarkable. He was the principal person involved in all these transactions, and could have given us the first hand account thereof. He could have denied on oath the allegations made by the defendant and his witnesses, and his cross-examination by the defendant would have elicited several points. He attended the Court on many hearings and should have been the first witness to be put in the witness box on the plaintiffs' behalf. The principal evidence of the plaintiffs began on 10th December, 1918, and Sukhdeo was alive till the end of May following. It was said that from before 10th December, 1918, till his death, Sukhdeo was ill and unable to give his evidence. This illness did not, however, prevent his going about on tour in the interior of the district and travelling by train, as is apparent from the order-sheets of the 4th March and the 15th April, 1919. He was intentionally kept back, the idea perhaps being to put him as the last witness on the plaintiffs' side."

Their Lordships are again unable to hold that this inference is unwarranted, or that on the facts established, the learned Judicial Commissioner was in error in finding material corroboration of the defendant's story.

As regards the last-mentioned circumstances of corroboration noted as (*e*) above, Gajadhar's evidence was that in the books of the Adat shop certain items had been debited on dates prior to the 17th February, 1913, in the names of certain persons, though the transactions never took place. The effect was to withdraw so much money from the till. These bogus debit entries were squared up by corresponding credit entries made after the 17th February, *i. e.*, after the defendant had undertaken the liability of Rs. 7,000 as being defalcations for which his brother was responsible. If the question of these defalcations rested on the evidence of Gajadhar alone, it would have been difficult to accept the story of the alleged deficiency. But the Judicial Commissioner found that some, though not all, of the alleged bogus entries were proved to be such by independent and disinterested witnesses who proved that the credit and debit entries in question appearing in the plaintiffs' books, and purporting to be records of transactions with those witnesses or their firms,

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did not appear in their own books of account, and that no such transactions took place in fact. It was hardly to be expected that such independent evidence would be available in respect of all the various items relied upon by the defendant as bogus items. But the books are sufficiently discredited if a certain number are proved which precludes the possibility of error or accident, and their Lordships are unable to hold that the Judicial Commissioner was wrong in holding that the evidence of the witnesses examined by the defendant left no reasonable doubt about there having been defalcations and deficits.

In the result the Judicial Commissioner accepted the story of the defendant, and held that the acknowledgments in the Sarkat book were given and the mortgage in suit executed by the defendant under the circumstances alleged by him.

Their Lordships consider that no sufficient reason has been shown to disturb these findings of fact, which are sufficient to dispose of the case.

The plaintiffs having made a substantive case as to the consideration for their mortgage, cannot now be allowed to shift their ground and urge that the defendant accepted the civil liability of his brother Gajadhar for the defalcations which he alleged and which they denied. Their Lordships, therefore, consider it unnecessary to go into the question whether a creditor can or cannot by stifling a prosecution obtain a valid guarantee for his debt from third parties.

Their Lordships will humbly advise His Majesty that the judgment and decree of the Judicial Commissioner should be affirmed, and this appeal dismissed with costs.

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, KT., *Officiating Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

R. E. Muhammad Kassim Rowther of R. E. Muhammad Kassim Rowther and Co., Negapatam ... *Assessee.*

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The Commissioner of Income tax, Madras *v.* Muhammad Kassim Rowther.

Indian Income-tax Act (XI of 1922), Ss 3 and 10 (IX)—Person having business at various places—Employees at the places—Complete control of business retained by the employer—Employees to be paid share of net profits after two years—No provision for liability of employees in case of loss—Liability of employees for dismissal in certain events—Employees whether partners with the employer—Share of profits paid to employees, if can be deducted from the assessable income.

A document executed by 33 persons to one M. K. recited that M. K. had various businesses at certain places, that each of the executants will work for M. K. in each place for two years and then take stock and hand over everything to him, that the net profits at the end of two years will be divided into shares and the executants will be entitled to small shares for their remuneration, that the business dealings of the firm are to be signed by M. K. and, in his absence, by his authorised agent, that the complete control of the business is to be retained by M. K. who contributed the whole capital and persons holding power of attorney from him, that the executants will be bound by the orders of M. K. and those holding power of attorney from him, and that, if they contravened the provisions of the agreement, they can be dismissed. There was no provision in the document for their liability in case of loss.

Held, (1) that this document did not create a partnership agreement but the 33 persons were merely the employees of M. K., and, consequently, M. K. was laible to assessment to income-tax as the sole owner of the businesses, and,

(2) that the portion of the profits which was to be paid to the 33 persons as wages after the two years' period cannot be deducted from the assessable income under S. 10 (IX) of the Income-tax Act, as it is not expenditure incurred solely for the purpose of earning the profits.

Case stated under S. 66 (2), Act XI of 1922, by the Commissioner of Income-tax, Madras, for the decision of the High Court :—

(1). "Whether in the circumstances of this case there was a genuine and valid partnership?

*Referred Case No. 13 of 1926, 16th September, 1927.

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(2). "If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable income the portion of the profits which was to be paid to the employees as wages?"

2. The assessee is a very wealthy Muhammadan who carries on from his headquarters at Klang an extensive business throughout the Federated Malay States. He has branches at Negapatam, Madras and Rangoon in British India. For the year 1924-25 the Income-tax Officer originally made an arbitrary assessment under S. 23 (4) on an income of Rs. 5 lakhs because the assessee's local agent failed to appear or produce accounts. On a petition under S. 27 the assessment was re-opened and made on an income of Rs. 53,093 :—

Rupees 1,594 from property;
" 5,310 from business in Negapatam;
" 35,230 from business at Madras;
" 8,067 from business at Rangoon; and
" 2,892 from other sources, *viz.*, interest.

The question at issue concerns the method of making the assessment under the heading 'Business'. The Income-tax Officer has treated Mr. R E. Muhammad Kassim as the sole owner of the business, while the assessee contends that his firm, called R. E. Muhammad Kassim & Co., is a partnership. The only evidence produced to prove the existence of the partnership is a certain document which has been referred to by the Assistant Commissioner and the Income-tax Officer as a partnership deed. I enclose a translation of this document—Ex. A. I have endeavoured to make the translation literal.

3. In my opinion the document in question is not a partnership deed but merely an agreement by 32 persons to serve their master R. E. Muhammad Kassim on certain terms. The agreement begins by saying "it is given to R. E. Muhammad Kassim by 33 persons". It goes on to state that R. E. Muhammad Kassim has various businesses at certain places and says that the signatories to the agreement will work for Muhammad Kassim for two years and then take stock and hand over everything to him. It then says that setting aside the book debts which will be taken over by R. E. Muhammad Kassim and having collected the balance and paid the salaries to the clerical establishment and the dues to other persons the balance *'Labhanashtam'* will be divided into 96 1|16 shares and distributed in proportions mentioned; R. E. Muhammad Kassim receiving 70 shares

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and the others receiving small shares varying from 1 1|2 to 8|16. The profit is to be received by the *kuttalies* in two equal instalments in the 12th and 18th month from the date of the closing of the accounts. It is stated that all the business dealings of the firm are to be signed by Muhammad Kassim and in his absence by his authorized agent and that each of the co-workers or *'kuttalimargal'* is to receive $30 per month for private expenses. Power is given to Mr. R. E. Muhammad Kassim to take new Co-workers or *'kuttalimargal'* or to increase or decrease the share of the existing co-workers at the time of the closing of the accounts. These closed accounts are to be handed over to Mr. R. E. Muhammad Kassim on 31st December, 1923, and after the date the whole assets of the business are to belong to him or to his authorized agent, the other *'kuttalimargal'* having no right whatever in the business. At the end of the document these co-workers bind themselves to obey the orders of Muhammad Kassim or of his authorized agent and, if they are found to have disobeyed his orders, to have their accounts closed and settled in cash. In the light of this summray of the document it seems to me impossible to contend that it evidences a partnership. The signatories, of whom Mr. Muhammad Kassim does not seem to be one, are not agreeing to combine their labour to earn profits. They are agreeing to serve Mr. Muhammad Kassim. If it were a partnership and if the co-workers were partners, the chief partner could not, in his individual capacity, authorize another partner to sign on behalf of the firm. The only ground that the petitioner has for holding that the document embodies a partnership is a vague reference in the second paragraph to *'Kanapatta labhanashtam'*. This word, it is true, may be translated into profit and loss, but, it is very commonly used by merchants to mean simply the balalnce, and the context shows that there is no question at all of any of the co-workers bearing any loss. The words 'by the Grace of God' would not have been used with reference to losses. When the dues of the firm have been collected and paid, the balance, if any, is to be divided in certain proportions. In the sentence immediately following, which details how the division is to take place, there is no word said about *'nashtam'*. It is the *'labam'* which is divided into 96 1|16 shares.

My other reasons for holding that this document does not denote the creation of a partnership are these:

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Under S. 4 (2) of the Indian Companies Act VII of 1913, a partnership of more than 20 persons formed for the purpose of carrying on business is illegal. The Federated Malay States law is similar. S. 4 (*ii*) of Enactment No. 20 of 1917 of the Federated Malay States runs as follows:

"No company, association or partnership consisting of more than 20 persons other than an association of miners working in the Chinese 'Hun' system shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by individual members thereof unless it is registered as a company under this enactment or is formed in pursuance of some other enactment or by Royal Charter or Letters Patent".

(*ii*) In all his advertisements, circulars, note papers and visiting cards, Mr. R. E. Muhammad Kassim describes himself as the sole proprietor of R. E. Muhammad Kassim & Co.

(*iii*) In the power of attorney which he gave to one of his co-workers, *viz.*, R. A. Abdul Khader Ravuthar to manage the affairs at Madras and Negapatam he again describes himself as the sole proprietor of the business.

(*iv*) The manager of the Rangoon branch, K. A. Abdul Hamid, who is one of the signatories to the agreement, in a statement given before the Income-tax Officer, Rangoon, on 4th March, 1925 has said:

"I have no exact ideas as to the constitution of the firm but I do not think there are any partners. Mr. R. E. Muhammad Kassim is the sole proprietor and he gives bonuses to some of his relatives who are associated in the business with him".

(*v*) In the objection petition under S. 27 drawn up by vakil Mr. M. Subbaraya Aiyar it is stated that the petitioner R. A. Abdul Khader is only an agent in charge of the work to be done at Madras and Negapatam.

(*vi*) The word *'kuttalimargal'* which is used to describe the signatories to the agreement is the common term employed in Tamil districts to denote people who are remunerated by a share in the profits. I have never seen it used to describe a partner.

(*vii*) The judgment of the Hon'ble Mr. Justice Wallis in C. S. No. 440 of 1912, which petitioner's counsel produced before me in support of his case, seems to me to be very much in favour of the Crown. That judgment makes a clear distinction between partners in the real sense of the term and working partners and disposes of the petitioner's claim that, according to Muhammadan custom, a working partner is always considered by law courts to be a real partner.

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As regards the second question the position is as follows:— According to the agreement described above, the '*kuttalimargal*' were to be permitted to draw $30 per month and, when the accounts had been closed at the end of two years, they were to receive additional remuneration in the shape of a further share of the profits in two instalments after a period of 12 and 18 months. Petitioner claims that, from the income assessed at Madras, Negapatam and Rangoon as having been earned in the calendar year 1923, that portion, which according to the agreement would have to be paid at some later date to the workers, should be deducted. The Income-tax Officer made the assessment on the income from these three branches strictly according to the accounts produced. He allowed every item of salary or remuneration deducted in the accounts as having been paid or debitted. He felt he could not go beyond the accounts and allow some future problematic deduction. I consider that he was perfectly correct. It has been found that in the year after the year of account some entries were made in the Klang books in favour of the workers. These entries are not strictly in proportion to the shares laid down in the agreement, but, have been increased or decreased by Mr. Muhammad Kassim at his own will and pleasure. If any of the workers had been away from their posts for a portion of the two years, he has made the proportionate deduction in their shares, while to others he has given bonuses which seem to be in the nature of gifts. I do not know of any justification for the petitioner claiming a problematical future liability as an expenditure. The expenditure, moreover, was incurred in a later year and was not incurred in British India. The whole of the payments made may well have been given out of the profits from the main firm in the Federated Malay States which we are not taxing. Moreover as the payments were made outside British India, we cannot tax the individuals on the amounts received by them. I am therefore of opinion that the petitioner cannot be allowed this deduction against his income in British India.

M. Patanjali Sastri for Referring officer.

The Advocate General and *E. Vinayaka Row* for assessee.

The Court delivered the following

The Offlcg., C. J.

JUDGMENT :—*The Officiating Chief Justice* :—The first question referred is "whether there was a genuine and valid partnership". This depends upon the construction of the agreement, dated the 11th of April, 1922,

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executed by 33 persons in favour of the petitioner. The petitioner has been treated as the sole proprietor of his firm and been assessed accordingly, and he contends that these 33 persons who have executed the agreement of April 1922 (Ex. A) are his partners in the business. The Commissioner has found that this agreement does not constitute a partnership agreement and we entirely agree. Apparently there is a provision that each of the executants is to have a certain share in the profits of the business when ascertained at the end of the two years during which it is to be in force. No provision is made for their liability in case of loss and the complete control of the business is retained by Muhammad Kassim, who contributed the whole capital. Not only is he to have the control of the business, but, even persons holding power-of-attorney from him are to have the same power. The executants agree to be bound by Muhammad Kassim's orders and the orders of those holding his power-of-attorney and also agree that, if they contravene the provisions of the agreement, they can be dismissed. The proprietor has also the power of altering the shares. On these facts, it is clear that this is not a partnership agreement and that these 33 persons were merely the employees of Muhammad Kassim and were entitled to certain shares in the profits when ascertained at the end of the two years.

The second question runs as follows :

"If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable income the portion of the profits which was paid to the employees as wages"?

The petitioner claims to deduct the shares payable to the employees under S. 10 (*ix*) of the Indian Income-tax Act, which runs :

"any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains".

The Income-tax Commissioner has held that it has not been shown that the shares were paid out of the capital in the Madras branches of the petitioner's firm and that there are merely some entries in the accounts of the head-office at Klang in the Federated Malay States. Apart from this, we think it is clear that this expenditure does not come within the meaning of S. (10) (*ix*). Such expenditure is to be set off against the profits earned in the year and it must be incurred "solely for the purpose of earning such profits or gains". Is it possible to say that payments out of profits really constitute expenditure incurred solely for the purpose of earning such profits? The

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amount of the expenditure depends on the amount of the profits and, consequently,it is impossible to hold that it was expenditure incurred solely for the purpose of earning those profits.

It is contended by the learned Advocate-General that expenditure must be deemed also to include liability and that, inasmuch as these payments were in the nature of wages of which payment was deferred, they, equally with wages, should be deducted and, to hold otherwise, would produce the anomaly that part of the wages of the firm might be deducted and another part not. This may be anomalous, but, it must be remembered that income-tax is calcutated on profits and, when the tax has been calculated, the expenditure on the deferred wages has not been incurred. In fact, it might not ever be incurred if the proprietor chose to break the agreement, and certainly it cannot be deemed to be expenditure incurred for the purpose of earning such profits. It is not the expenditure that has led to the profits being earned, but, it is a promise that such expenditure would be made in the future that has possibly produced those profits. Rule 3 (*l*) of Schedule D of the English Income-tax Act, 1918, prescribes that "in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of any annual interest, or any annuity or other annual payment payable out of the profits or gains". This is very specific and would include the payment out of profits in the present instance. Similarly, if some of the working partners are to get a share in rsepect of capital put in by them any payment to them as interest on that capital cannot be deducted under S. 10 (*iii*) of the Indian Income-tax Act. In view of the language of the section which is very vlear, we think it is unnecessary to refer to the cases cited before us and hold that, although it may possibly work hardship in a few cases, the payment to these working partners out of the profits cannot be deducted under S. 10 (*ix*). Petitioner will pay costs including counsel's fee of Rs. 250.

Ramesam, J.

Ramesam, J. :—I agree.

Beasley, J.

Beasley, J. :—I agree.

N. S. *Question No. 1 answered in the negative and No. 2 answered in the affirmative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR WILLIAM PHILLIPS, KT., *Officiating Chief Justice*, MR. JUSTICE RAMESAM, AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

R. E. Muhammad Kassim Rowther of R. E. Muhammad Kassim Rowther & Co., Negapatam ... *Assessee.*

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The Commissioner of Income-tax, Madras *v.* Muhammad Kassim Rowther.

Income-tax Act (XI of 1922), S. 4 (3) (i)—Assessee having places of business within and without British India—Remittances from outside British India to British India—Remittances spent on charitable and religious institutions by the assessee—Exception from liability to assessment.

Where an assessee carries on business at places within and without British India and remittances are made from the place outside British India into British India and spent on certain charitable and religious institutions by the assessee, the moneys remitted are liable to assessment to income-tax, unless it is shown that they were impressed with a trust before they left the foreign place for British India. The mere fact that they were allotted to a trust after their receipt in British India is not sufficient to secure exemption from liability to assessment.

Case stated under S. 66 (2), Act XI of 1922, by the Commissioner of Income-tax, Madras, for the decision of the High Court:—

(1) "Whether in the circumstances of the case there was no genuine and valid partnership?

(2) "If it is held that there is no genuine and valid partnership whether it is legal in the circumstances of this case to refuse to allow the share of the working partners as a deduction?

(3) "Whether the sums shown in the accounts of the business in the names of certain charitable and religious institutions and remitted to British India and spent on these institutions are assessable under the Indian Income-tax Act, 1922?"

2. The facts of the case are similar to those detailed in the reference already made relating to the 1924-25 assessment except that a new agreement regarding the constitution of the firm was drawn up on 26th March, 1925. A literal translation of the new agreement is appended—Exhibit A. It is similar to the former agreement except that three of the '*kuttaligals*' are

*Referred Case No. 14 of 1926. 16th September, 1927.

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The Commissioner of Income-tax, Madras v. Muhammad Kasim Rowther.

said to have contributed $ 5,000 as capital. There is no proof that this capital was actually contributed and the only evidence on the point is the statement of one of the *'kuttaligals'* given before me at the hearing of the application that his $ 5,000 was moneys standing to his credit in the Klang accounts. I do not consider that the entry showing contributions of capital by three *'kuttaligals'* makes any difference in the construction of the document. These three *'kuttaligals'* are in exactly same position as the *"Madibhagidars"* referred to in Civil Reference No. 14 of 1924 of the Bombay High Court [*The Commissioner of Income-tax, Bombay* v. *Haji Jamal* (1).] They have lent money to the petitioner on which, in accordance with Muhamadan custom, they are to receive a share in lieu of interest.

3. For the reasons given in the previous reference I am of opinion that the agreement, dated 26th March, 1925, does not create a partnership.

4. As regards the second point referred, this case is slightly different to that of the previous year, because, in the present accounting period entries were made in the Klang accounts showing a distirbution of the profits between the *'kuttaligals'*. These entries however relate to the previous agency. There is no real proof that these payments were made in February, 1924, the only proof offered before me being an entry in one of the Klang books, that entry being followed by some undated signatures which cannot possibly have been made at the same time. In spite of the entry I do not think any reduction can be made in the assessment. The entry occurs in the books of the firm at Klang. We are only assessing the profits of the Madras, Negapatam and Rangoon branches. As the books of these branches contain no entries regarding these payments and as the payments were recorded in the books relating to the business in the Straits which we are not assessing, the payments are not an admissible deduction against the British Indian profits. Further the payments made are not in proportion to the shares shown in the old agreement which should have governed them. They have been reduced or increased at the will of Mr. R. E. Muhammad Kassim. There was no provision in the old agreement for the reduction of shares for absence and the reductions appear to have been entirely arbitrary. The recipients are mostly relatives and the payments appear therefore to be of the nature of gifts.

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1. (1924) I L R 49 B 362.

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The Commissioner of Income-tax, Madras *v.* Muhammad Kassim Rowther.

5. As regards the third point—the facts are that large remittances are received from Klang through the Chartered Bank. They are first credited in the Klang ledger kept at Rajagiri—the petitioner's chief place of residence in British India. From that ledger part of the remittances are transferred to the two charity accounts—Jackthu and Madras. The Income-tax Officer held that the amounts transferred to the two charity accounts, *viz.*, Rs. 27,926, were private expenditure by the assessee and therefore profits to the Klang business remitted. Petitioner argues that they are trust moneys. The only portions which could possibly be construed as trust moneys are the ½ share due to "Dharma" and "Madrasa"—according to the old agreement, *viz.*, $ 13,309,84 each. The balance is obviously private money. As regards the two sums of $ 1,309.84, I do not consider that they can be regarded as trust funds. Mr. R. E. Muhammad Kassim has simply shown some of his own profits in the names of the two charities. The Madras High Court has already held in the case of A. V. R. A. Adikappa Chetti that such profits if remitted to British India are taxable.

M. Patanjali Sastri, Special Counsel for Income-tax, on behalf of the Referring Officer.

Advocate General and *E. Vinayaka Rao* for Assessee.

The Court delivered the following

The Offg., C. J.

JUDGMENT :—*The Officiating Chief Justice* :—In this case three questions have been referred, of which, the first two are the same as in Referred Case No. 13 of 1926, and must receive the same answers.

The third question is,

"whether the sums shown in the accounts of the business in the names of certain charitable and religious institutions and remitted to British India and spent on these institutions are assessable under the Indian Income-tax Act, 1922?"

Exemption is claimed by the petitioner on certain sums, which were remitted from Klang to British India, and have been spent on charitable and religious institutions in British India. It is suggested that these sums were taken from a fund set apart in Klang for these charitable and religious purposes. This does not seem to have been proved and, therefore, the remittances to British India must be deemed to be remittances out of the proprietor's own money which he could dispose of as he pleased. That he, in fact, spent the moneys on charitable and religious institutions would not exempt those moneys from income-tax. In order

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to secure exemption on that ground, it must be shown that the moneys were impressed with a trust before they left Klang for British India. It is not sufficient to allot them to a trust after their receipt in British India.

The answer to this question must be in the affirmative.

Petitioner will pay costs including Counsel's fee Rs. 250.

Ramesam, J. :—I agree.

Beasley, J. :—I agree.

N. S. *Answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Rajah Saheb of Vizianagram ... *Petitioner** (*Petitioner*).

v.

The Sub-Collector of Berhampore ... *Respondent* (*Respt.*).

Rajah Saheb of Vizianagaram
v.
The Sub-Collector of Berhampore.

Practice—Application for copies—Demand of search fees—Legality.

Where an application is made to a Court for copies of domuments, the Court has no power to direct the applicant to pay search fees. All that the applicant is bound to do is to supply stamps for copies and, if the required number of copy stamps is supplied, it is the Court's duty to furnish copies asked for.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the Order, dated 5th September, 1925, of the Court of the Sub-Collector of Berhampore in C. No. 385 of 1925.

S. Venkatesa Aiyangar for petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the Sub-Collector of Berhampore demanding search-fees for supplying copies to a party. It is difficult to see under what provision of law the Sub-Collector directed search-fees to be paid by a party applying for copies of records in his Court. There is no provision of law and there is nothing in the Civil Rules of Practice or in any rule which governs the procedure in Civil Courts, authorising the levy of search-fees for supplying copies to litigants. When an application is made, all that is required by a party is to supply stamps for copies and, if the required number of copy stamps are supplied, it is the Court's duty to furnish copies asked for. The order of the Sub-Collector is clearly with-

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* C. R. P. No. 1360 of 1925. 8th November, 1927.

Rajah Saheb of Vizianagaram v. The Sub-Collector of Berhampore.

out jurisdiction and is therefore set aside, and the Sub-Collector will direct his office to furnish such copies as the parties may require on their furnishing the copy stamp papers. If such illegal orders are passed, this Court will consider whether the officer passing such orders should not be made to pay the costs of an application of this kind.

N. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE DEVADOSS.

Bhogaraju Kanakamma ... *Appellant** (*Plaintiff*)

v.

The Secretary of State for India and others ... *Respondents* (*Defendants*).

Kanakamma v. The Secretary of State for India.

Madras Irrigation Cess Act, VII of 1865—S 1, Priviso—Ryotwari tenant—Penal assessment—Liability for—Legitimate source of water supply—Flow of water from, through breach not caused by pattadar—Flow for a short time only.

In roder to bring a ryotwari tenant in possession of lands classified and assessed as wet within the meaning of the proviso to S. 1 of the Madras Irrigation Cess Act, VII of 1865, he must do something in order to let water into his lands or must raise or attempt to raise a crop with the help of the water from a source from which he is not entitled to get water.

A channel, which supplied water to the appellant, a ryotwari tenant, was closed by the Government. A few days after its closure, the channel was again breached, the water which flowed through the breach first filled the neighbouring fields and then flowed into the appellant's fields for three or four days. Neither the breach nor the flow into his fields was caused by any act or omission on the part of the appellant. The flow through the breach was at a time when the appellant was not entitled to water from the channel.

Held, that, the appellant was not liable to pay penal assessment for the water which thus flowed into his fields.

Second Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suit No. 209 of 1923, preferred against the decree of the Court of the Principal District Munsif of Ellore in O. S. No. 582 of 1922.

P. V. Rangaram for appellant.

The Government Pleader, B. Satanarayana and *V. Suryanarayana* for respondents.

The Court delivered the following

JUDGMENT :—The appellant is a registered pattadar of some lands. She brought a suit against the 1st defendant, the Secretary of State for India in Council, for the recovery

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*S. A. No. 1332 of 1924. 8th April, 1927.

Kanakamma v. The Secretary of State for India.

of a sum of money collected from her as penal assessment for unauthorised irrigation of her fields with water from a government channel. The District Munsif gave a decree in her favour; but the Subordinate Judge dismissed her suit on the ground that the water which flowed through a breach aided in the cultivation of her lands. The facts found are that there was a breach in the channel which supplies water to the appellant's fields. That was closed and, a few days after its closure, it was again breached owing, it is alleged, to cattle passing and repassing on the portion of the bund newly put up and the water that flowed through the breach passed on to the appellant's fields. The Subordinate Judge holds the appellant liable to the levy of penal water-cess as her lands were benefited by the water which flowed through the breach. His finding on this point is in the following terms :

"It cannot be said that the cultivation of the lands in question was not aided by the Government water which flowed through the breach for three or four days into them and that ploughing was not facilitated by the said water. Hence, I am of opinion that the water which flowed through the breach into the lands in possession of defendants 2 and 3 aided in the cultivation of the said lands."

The question is whether on this finding a ryotwari tenant in possession of what is known as mamool wet is liable to pay penal assessment in respect of water which flowed into his land without his doing anything to let the water into it. The channel in which the breach occurred is admittedly the channel which supplies water to the appellant's fields for irrigation. The contention of the 1st defendant is that the pipe through which water flows from the channel into the appellant's fields was closed for a time by the revenue authorities and therefore the appellant was not entitled to get water during that time from the channel and the use of the water flowing through a breach was not water to which the appellant was entitled and therefore the Revenue authorities are entitled to levy penal assesment. Does the case of the appellant come within the proviso to S. 1 of the Irrigation Cess Act, VII of 1865. The proviso is in the following terms:

"Provided also that no cess shall be leviable under this act in respect of land under ryotwari settlement which is classified and assessed as wet unless the same be irrigated by using without due authority water from any source herein before mentioned and such a source is different from or in addition to that which has been assigned by the revenue authorities or adjudged by a competent Civil Court as a source of irrigation."

Under this proviso, in order to make a ryotwari tenant in possession of land classified and assessed as wet liable, he

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should irrigate without authority water from any source mentioned in the preceding clause of S. 1, that such a source should be different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as a source of irrigation to such a land. If water flows from the source which is the source of water for the irrigation of his land he cannot be held liable to pay penal water rate. If he takes water or uses water from a source which is not assigned by the revenue authorities or adjudged by a competent Civil Court as a source of irrigation to his land then he may be liable for penal assessment. But where he uses water from a source which is the legitimate source of irrigation for his land then he would not be liable for penal assessment unless he takes water at the time when he is not permitted to take water or when he is not entitled to take the same. When water flows from the legitimate source of irrigation without any act or illegal omission on his part, can he be liable?. In this case the water flowing from the breach flowed over the fields situated between the breach and his lands and, after flooding them, the water seems to have over-flowed the ridges of his neighbour's lands or percolated through them. The water flowed through the breach only for 3 or 4 days. Whether he had any benefit from the flow of such water or whether the water caused any damage to him by preventing the field from drying up during the period during which it should be allowed to dry up is not a necessary question for considering whether the appellant is liable to penal assessment or not. Where water standing in a neighbour's field overflows the ridges of that field and flows into another man's land, the latter cannot be held liable for penal assessment, for, he could not have prevented the overflood. No doubt, if he actively aided or did something to let water into his field at a time when he is not entitled to that water, he may be said with some show of reason that he has taken unauthorisedly. But in this case it is quite clear that the water which flowed through the breach first filled the neighbouring fields and then entered the appellant's fields.

The learned Government pleader has admitted that water of the channel flows through a pipe inserted in the bund to the fields belonging to the appellant and his neighbours. It follows that the channel is the legitimate source of irrigation to the appellant's fields. It appears that water flowing through a breach not caused by him or at his instance filled his neighbour's fields. On these facts, it is not possible to hold that the

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appellant is liable to pay penal assessment. The proviso clearly says that no cess shall be leviable in respect of mamool wet unless the land is irrigated without due authority from a source different from that to which he is entitled. A person cannot be said to irrigate his fields, if water collected in his neighbour's fields over-flowed the ridges and then filled his lands. There may be cases where water flowing in such manner might flow for a long time and thereby enable one to cultivate his field at a time when he is not entitled to water; but, the flow of water for a short time, say for a day or two, through a breach or sluice, which is closed, but, which gives way owing to natural causes, cannot make a ryotwari tenant in possession of land classified and assessed as wet liable to pay penal assessment. The learned Government pleader relies upon *Secretary of State for India* v. *Swami Naratheswarar* (1) for his contention that if water flows into a man's fields even without his volition or anything being done on his part to get water he is liable to pay water cess to Government. The facts of that case are distinguishable from those of the present. That was a case of inam lands. The inamdar was not entitled to the use of water. He did make use of the water which flowed into his lands and raised crops. It was held that he was liable to pay water cess. If a person who is not entitled to water from a Government source gets water owing to a breach or owing to the overflowing the water bunds and raises crops with the help of such water, or uses the water which comes into his lands to which he is not entitled and raises crops, then, he would no douübt be liable to pay water rate to Government. But the case of a ryotwari tenant in possession of lands classified and assessed as wet is different. The case in *Krishna Row* v. *The Collector of Kistna* (2) is also distinguishable from the present. In that case the plaintiffs irrigated from two pipes instead of one which was the authorised source of irrigation. Though there was nothing to show that the second pipe was inserted at their instance it was held that they were liable to pay water rate. There the finding was that the water from the 2nd pipe to which they were not entitled was used for irrigation and they were not entitled to the use of water from the 2nd pipe. It is upon that finding that a bench of this Court held that they were liable to pay water rate.

The expression "unless the same be irrigated by using water" must be given its proper meaning. A person cannot be said to irrigate his land if for a few hours water overflows his neighbour's fields and then falls into his lands. Supposing

1. (1910) I L R 34 M 21 : 20 M L J 766. 2. (1914) 26 M L J 210.

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the revenue authorities closed a certain sluice which is the source of irrigation to a man's land, owing to natural causes the sluice gave way and for a day or two water flowed into his land without any act on his part, he cannot be said to irrigate his lands by using water without due authority. In order to bring the ryotwari tenant in possession of lands classified and assessed as wet within the meaning of the section, he must do something in order to let water into his lands or must raise or attempt to raise a crop with the help of the water from a source to which he is is not entitled or at a time when he is not entitled to get water from his legitimate source. What seems to have happened in this case is that the revenue authorities, not being able to fix the blame upon anyone in particular with regard to the causing of a breach in the channel, thought it best to assess everyone into whose fields the water from the breach flowed. On the facts of this case I have no hesitation in holding that the 1st respondent is not entitled to levy penal water rate from the appellant. I therefore set aside the decree of the Subordinate Judge and restore that of the District Munsif, with costs here and in the Court below, to be paid by the 1st defendant.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Ramachandran, minor by mother and guardian Visalakshi Ammal ... *Plaintiff**

v.

C. Sabapathy Mudaliar and 4 others ... *Defendants.*

Ramachandram v. Sabapathy Mudaliar.

Civil Procedure Code, O. 22, R. 9—Death of defendant—Abatement of suit—Application to set aside the abatement—Delay in making the application—Plaintiff a minor represented by mother as next friend—Ignorance of law on the part of the next friend—Sufficient cause—Limitation Act, S. 5—Tests to be adopted.

In a suit brought by a minor plaintiff represented by his mother as next friend, the second defendant who was the paternal grand-mother of the plaintiff and the mother-in-law of the next friend died on 25th April, 1927. The application to set aside the abatement and bring on record the legal representatives of the deceased second defendant was made only on 7th October, 1927, and was supported by an affidavit of the next friend to the effect that, though she was aware of the death of the second defendant in time, she was ignorant of the fact that, on her death, her legal representatives should be brought on record until her aged father who was

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*In the matter of an appln. in C. S. No. 150 of 1923. 9th Decer. 1927.

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conducting the suit on her behalf brought the information to her from her counsel to whom he had gone to give instructions.

Held, that, "sufficient cause" within the meaning of O. 22, R. 9, Civil Procedure Code and S. 5 of the Limitation Act, must be held to have been made out in the circumstances of the case and the delay should be excused, especially as the plaintiff was a minor and it would be open to him to say that he was not bound by the result of this suit on account of the negligence of his next friend and file a fresh suit.

The test to be adopted in such cases is this : if the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, the application must be granted; if, on the other hand, the negligence was culpable or there was *mala fides* on the part of the applicant, or irreparable hurt would result to the other side, the application must be dismissed.

Collins v. *The Vestry of Paddington*, (1880) L R 5 Q B D 368, applied.

T. M. Venugopal Mudaliar and *T. R. Venkatesa Aiyar* for plaintiff.

P. Kothandaraman for 1st defendant.

T. Krishnaswami Aiyar for 2nd defendant.

The Court delivered the following

JUDGMENT :—The point, I have to decide, is, is the abatement of the suit as against the 2nd defendant to be set aside or not? The suit is brought on behalf of the minor plaintiff by his mother acting as his next friend. The 2nd defendant who was the paternal grandmother of the minor and the mother-in-law of the next friend died on the 25th of April, 1927, and no application was made within the 90 days allowed by the law to bring her legal representative on the record and, under O. 22, R. 4, Civil Procedure Code, the suit abated as against the 2nd defendant. The plaintiff had then a period of 60 days for applying under O. 22, R. 9, for setting aside the abatement. The application was not made within the time allowed, but, was made on the 7th of October, 1927, that is, a few days after the expiry of the aggregate period of 150 days.

In this case, under both the provisions of the law that apply, sufficient cause should be shown; first, the applicant must show "sufficient cause" under O. 22, R. 9, for not having brought in time the legal representative on the record; secondly, the applicant must show "sufficient cause" under S. 5 of the Limitation Act for not having made in time the application to set aside the abatement.

The next friend has filed an affidavit admitting that she was aware of the death of the 2nd defendant; indeed, having regard to the relationship between the parties, it would have been futile to deny it. The excuse

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put forward is, that the next friend did not attach any significance to this event, that is to say, she was entirely ignorant of the fact that, on the death of a party, certain steps should be taken in the suit. She proceeds to explain that the suit was conducted on her behalf by her aged father and that when the latter went to her counsel for giving instructions, it then came to his knowledge that a necessary step had not been taken. The point I have to decide is, has a sufficient cause been made out? In such a case as this, it is impossible to treat the question of "sufficient cause" as consisting of two different parts, as if, what is sufficient for one purpose is unconnected with what is sufficient for the other. It is a continuing cause, which cannot admit of a break, and, therefore, the question ultimately resolves itself into: is ignorance of law, in the circumstances, excusable? The cases on the point are by no means uniform and, to illustrate the wide diversity of judicial opinion, I may cite a few English decisions on an allied topic. Dealing with enlargement of time in regard to filing of appeals, Bowen, L. J., in *In re Manchester Economic Building Society* (1) observed:

"If he (the appellant) is asking for what may lead to injustice, he ought not to have it except on the terms which would prevent any injustice possibly being done. * * * * But, if the person who is asking for leave to appeal after 21 days is only asking for what is just, why should he not have it?"

James, L. J., in *International Financial Society* v. *The City of Moscow Gas Co.* (2), takes the very opposite view and is in favour of a rigid application of the rule as to time, and he observes that the Courts ought to enlarge time only in exceptional cases which are thus described:

"For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases, leave might be given."

A recent case, *Coles* v. *Ravenshear* (3), again illustrates how on this point widely different views could be taken. Collins, M. R., thinks:

"that the relation of rules of practice to the work of justice is intended to be that of hand-maid rather than mistress"

and says that, if the point were free from authority, he should unhesitatingly allow the time to be extended. Cozens-

1. (1883) L R 24 Ch. Div 488. 2. (1877) L R 7 Ch. Div. 241.
3. L R (1907) 1 K B 1.

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Hardy, L. J., expresses himself more or less to the same effect; whereas, Farwell, L. J., takes the view that a mistake "even on the part of eminent Counsel" is not a sufficient ground for granting the application. In that case, all the Judges felt, however, bound by the authority of *In re Helsby* (4) and declined to grant the extension. It must be noticed, however, that the cases to which I have referred were dealing with applications after judgment, for, a distinction is made between such applications and applications before judgment, on the ground that, in the case of an appeal, a party has a vested right in a subsisting order in his favour, the principle being, that the case has been fully heard on the merits in the Court below and the presumption, until the contrary is shown, is that the decision of that Court is correct. This difference is clearly brought out in *Collins* v. *The Vestry of Paddington* (5). The test laid down by Bramwell, L. J., in that case is this:

"Has the mistake or carelessness of the applicant or his advisers been real and unintentional, and can any damage which may be occasioned to the respondent by granting the indulgence be repaired by costs or otherwise? If so, grant it; if not, reufse it."

This is the test which the learned Lord Justice lays down, irrespective of the fact whether the application is before or after judgment. Adverting to this test, Baggallay, L. J., and Thesiger, L. J., in the same case observe that the test is a good one if applied to proceedings in the action, but not to applications after the action has been tried.

We are not bound by the English decisions on a point like this and I would respectfully adopt, in the case of all applications, the test laid down by Bramwell, L. J. If the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, the application must be granted; if on the other hand, the negligence was culpable, or there was *malafides* on the part of the applicant, or irreparable hurt would result to the other side, the application must be dismissed. The case with which I am dealing does not, however, present much difficulty, as the application made to me is one before judgment and not after judgment. There are several cases decided by Courts in India which support the view I am taking. *Krishna Mohan Ghosh* v. *Surapathi Banerji* (6) is a case decided by a bench of the Calcutta High Court and the facts there are very

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4. L R (1894) 1 Q B 742.
5. (1880) L R 5 Q B D 368. 6. (1924) 29 C W N 472.

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similar to the facts of the present case. The delay in that case was excused and it was held that there was sufficient cause. *Sudhakar* v. *Sadasiv* (7) relates to the filing of an appeal and is also a decision of the Calcutta High Court. The facts were: The father of the applicants had died, they were themselves minors; their guardian was a female and they resided in an out of the way village. It was held that there was sufficient cause and the delay was excused. In *Krishna* v. *Chathappa* (8), there was a delay in the filing of an appeal and it was excused, the Court holding that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fides* is imputable to the appellant. In the same case, the learned Judges stated that they were not prepared to hold that a mistake of law is under no circumstances a sufficient cause. I may also refer to *Shibdayal* v. *Jagannath* (9), where, a Full Bench of the Allahabad High Court took a similar view, after expressly holding that the rigid rule applied in English Courts ought not to be applied in India.

In this case, there is an additional reason for holding that the delay ought to be excused. The plaintiff is a minor and he cannot be finally deprived of his right by the negligence of his next friend and it is open to him to say that he is not bound by the result of this action and file a fresh suit. The question, then, is, is he to be allowed to continue the suit, or be driven to another action? This, to my mind, must be an additional reason for granting the application. I have come to the conclusion that the delay must be excused and I set aside the abatement and direct that Batchammal and Kannammal be brought on the record as the legal representatives of the 2nd defendant.

The 1st defendant's costs of the application shall be costs in the cause and I certify for Counsel for him.

N. S. *Application granted.*

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7. (1915) 19 C W N 1113.

8. (1889) I L R 13 M 269. 9. (1922) I L R 44 A 636 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Vasudeva Rao and another, minors by Jeeva Bai Ammal, their next friend ... *Plaintiffs**

Sakaram Row and five others ... *Defendants.*

Vasudeva Rao v Sakaram Row.

Hindu Law—Joint family—Partition between the members—Allotment of a share to two minor brothers—No definition of their shares inter se—*Brothers living together as members of co-parcenary and carrying on trade jointly after attaining majority—Acquisition of properties by the brothers in the course of trade—Subsequent partition between the brothers—Properties obtained on partition, if joint family properties—Will by one of them dealing with these properties—If operative and binding on his sons.*

The members of a joint family which consisted of two minor brothers, their step-brother and the paternal grand-father effected a partition in 1880, the two minor brothers being represented by their mother as their guardian, under which one eighth share of the properties was allotted to the grand-father, one eighth share to the mother of the testator, three eighths to the step-brother and three eighths to the two minor brothers. The partition deed provided that the mother of the minors was to receive their share and manage it till they came of age but did not define separately their shares *inter se* In 1895, after both the minors had become majors, they and their mother sold a house which had been allotted to the share of the minors. The evidence showed that, after 1880, the two brothers lived under the same roof, had a common mess and continued to trade jointly and live as members of a co-parcenary till 1921, when they effected a partition between themselves. This partition deed recited that, with the aid of ancestral nucleus, they carried on a joint trade and acquired considerable properties which they divided. One of these brothers executed a will in respect of his properties in 1925 and died in 1927. His sons by his first wife brought a suit for a declaration that the will was inoperative on the ground that the properties dealt with by it were joint family properties in which they had an interest by birth.

Held, (1) that the partition of 1880 did not have the effect of separating the two minor brothers from each other.

Palani Ammal v. *Muthuvenkatachala Moniagar* (1924) L R 52 I A 83 : I L R 48 M 254 : 48 M L J 83 (P C) referred to;

(2) that ancestral funds having been employed by the brothers in their trade, the properties acquired by them in the course of the trade were joint family properties in the sense that their sons got a right by birth in those properties; and (3) that, even on the assumption that ancestral funds were not employed by the brothers in the trade, the properties acquired by them in the course of the trade were joint family properties.

T. S. Venkatesa Aiyar for plaintiffs.

Mahomed Ibrahim for 1st and 5th defendants.

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*C. S. No. 359 of 1927. 24th November, 1927.

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C. Srinivasa Chari for 2nd to 4th defendants.

The Court delivered the following

JUDGMENT :—The plaintiffs seek to have a declaration that the will, left by their father Hassaji Rao, is inoperative in respect of the property dealt with by it, on the ground that it was at his death joint family property in which the plaintiffs have an interest. If the plaintiffs'.contention prevails, the testator had no right to dispose of the property in question and it devolves upon the testator's sons by survivorship.

In regard to the main facts there is little or no dispute. The earliest transaction, which I have to examine, is a division, effected among the members of this family, which is evidenced by the partition deed, dated the 20th of May, 1880. The parties to that partition were:

(1) Hassaji Rao, the testator,
(2) Ambaji Rao, his brother,
(3) Subba Rao, their Step-brother and
(4) Narasajirao, their paternal grand-father.

Ambaji and Hassaji, being minors, were represented by their mother Balu Bai as guardian at the partition. Under the partition deed, a small sum was set apart for an unmarried girl and the rest of the property was divided in the following proportion:—

(*a*) One eighth to the grand father,
(*b*) One eighth to the mother of the testator,
(*c*) Three eighths to Subba Rao and
(*d*) Three eighths to Ambaji Rao and Hassaji Rao.

Ambaji was the elder of the two and the deed provided that the mother was to receive their share and manage the same till they came of age. The property that fell to the share of these two boys consisted of a house at Bangalore valued at Rs. 500 and moveables worth Rs. 193-12-0.

We next pass on to a transaction of the 23rd of February, 1895. On that date Ambaji and Hassaji (who had by then become majors) and their mother sold for Rs. 1,700 the house at Bangalore to which I have referred. The sale deed of that date has been put in evidence.

The next undisputed event is a partition effected on the 10th of January, 1921, between Ambaji and Hassaji. The deed recites that, with the aid of ancestral nucleus, they carried on a joint trade and acquired considerable property and they proceed to divide the same into two equal shares, Ambaji the elder taking a moiety, and Hassaji the other moiety.

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The fourth important document in the case is the will in question. It was made on the 6th of June, 1925, and the testator appointed his brother Ambaji his executor. Hassaji married twice and both the wives were living at his death. By the first wife he had a son and by the second he had four sons. At the time of his death on 5th January, 1927, the former was with child, and after he died, she gave birth to a posthumous son. These two sons by the first wife are the plaintiffs in the case. When he made the will, the first wife was apparently living away from him and for some reasons alleged by the testator, he cut off his sons by the first wife—not with the proverbial shilling—but with a house of small value. The bulk of the property, he bequeathed to his four sons by the second wife. It is in these circumstances that the will is attacked by the plaintiffs, the senior wife's sons.

I have now stated the facts regarding which there is no dispute. Three points arise for decision.

(1) Did the partition of 1880 have the effect of separating Ambaji and Hassaji from each other?

(2) Was the joint trade of Ambaji and Hassaji carried on with any nucleus of ancestral property?

(3) If there was no such nucleus, were their acquisitions in trade joint, in which their respective sons could acquire a right by birth?

In regard to the first point, it must be observed that Ambaji and Hassaji were together allotted a three-eighths share, no attempt having been made to define separately their shares *inter se*. There was in fact no division between them, nor is there an agreement to hold the property as separate owners. The object of the deed was virtually to separate this branch from Subba Rao. The grandfather was not considered to be of much importance and he is treated more or less on the same footing as the mother of the boys. There is nothing in the deed to suggest that it was intended to effect a partition between Ambaji and Hassaji. It seems to me that, on the contrary, the clear intention was that they should continue to remain joint. In *Palani Ammal* v. *Muthu Venkatachala Moniagar* (1) their Lordships, after observing that a member of a joint family can take his share separating himself from the other members, go on to say:

"the remaining co-parceners, without any special agreement among themselves, may continue to be co-parceners and to enjoy as members of a joint family what remains after such a partition of the family property".

1. (1924) L R 52 I A 83 : I L R 48 M 254 : 48 M L J 83 (P C).

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In this case this is exactly what happened. There is a significant clause in the partition deed which the Court-translator has thus rendered:

"there shall in future be between us only relationship by blood but no relationship in regard to property between Subba Rao and Balu Bai, Ambaji Rao, Hassaji Rao (together)."

I am disposed to attach some importance to the position of the word "and". It could not be due to an accident that this word occurs after "Subba Rao" and before the enumeration of the members of the other branch. This is however a slight circumstance and I have come to the conclusion, on a reading of the whole document, that it was not intended that Ambaji and Hassaji should cease to be amongst themselves, members of a joint family.

In the case I have cited, their Lordships proceed to observe thus:

"That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parceners had separated from them."

In this case, it is established by clear evidence that, after the partition of 1880, the two brothers lived under the same roof, had a common mess and, down to the second partition of 1921, continued to trade jointly and live as members of a co-parcenary. Applying the test laid down in the passage quoted above, I unhestitatingly find that there was no separation in 1880 of Ambaji and Hassaji from each other.

I now turn to the second point. Within four or five years after the partition of 1880, the two brothers came down from Bangalore to Madras. They were then quite young and at first tried to make a living by working for wages in embroidery. This lasted only for a short time. It is unnecessary to follow their fortunes during this period, for, the brothers began a joint trade about the year 1896. I have already referred to the fact that the family house was sold in 1895 and that it fetched Rs. 1,700. The question is, was this sum or any portion of it utilised in the joint trade? In the later partition of 1921, there is a distinct statement that the trade was carried on with the nucleus of ancestral property. There is also the significant circumstance that it was very soon after the sale of the house that the trade was started. Ambaji Rao was examined as a witness for the defence and I cannot accept his evidence without reserve, for, I cannot regard him as a truthful witness at all. He has impressed me very badly and I find that the

proceeds of the house were utilised in the trade. The evidence of Ambaji in regard to the disposal of the sum of Rs. 1,700, I regard as a mere idle invention. It is opposed to the probabilities of the case as well as to the recital in the later partition deed. It is also opposed to his own conduct, for, in 1926 he sells a property which fell to his share and in the sale deed he joins his sons and grandsons as vendors, which fact shows that he treated the house as joint family property. Further, there is a recital in that sale-deed that Hassaji and Ambaji lived as members of a joint family. I therefore hold that ancestral funds were employed in the trade and that the acquisitions were made with the help of such nucleus.

I now pass on to the third point. Granting for a moment that there was no such nucleus, what would be the position? I have held that after the partition of 1880 Ambaji and Hassaji continued to be co-parceners. Where property is acquired in the course of a business carried on by members of a Hindu family by their joint labour, the property so acquired *may* become joint family property, notwithstanding the fact that it was acquired without the aid of ancestral nucleus. This proposition is now well-established. *See* dicta of Bashyam Aiyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2). A clear enunciation of this principle is contained in the judgment of Bakewell, J., in *Madhavaiya Chetty* v. *Damodharam Chetty* (3) which has been followed in *Ratna Mudaliar* v. *Vijiarang Mudaliar*(4). The latest case on the point is *Haridoss* v. *Devkuvarbai* (5). There is nothing thus in law to prevent the property, acquired, in trade by joint exertions by members of a joint family, from becoming joint family property—in the sense that the sons of the acquirers get a right by birth in that property. In each case, it is a question of proof whether they intended to acquire the property as partners or as members of a joint family. See again *Haridoss* v. *Devkuvarbai* (5). In the present case there can be no doubt that Ambaji and Hassaji intended to acquire the property not as partners but as members of a joint family. The joint trade was carried on for 25 years and, during the whole of that period, they had a common mess, they lived with their mother under the same roof and conducted themselves in every particular as members of a co-parcenary. From the

2. (1901) I L R 25 M 149, at pp. 156 and 157 : 11 M L J 353.
3. (1912) 12 M L T 240. 4. (1926) 23 L. W. 716.
5. (1926) I L R 50 B 443, at p. 448.

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funds of the joint trade they acquired immoveable properties, obtaining sale-deeds indifferently in the name either of Ambaji or of Hassaji. The evidence of Ambaji on this matter is worthless. He pretends that, at the start, he and his brother agreed to share the profits equally, that in the books of the trade they were shown as partners and the sums drawn by each were treated as drawings by partners. He asks me to accept his story that at the partition in 1921 books were handed to Hassaji who burnt them on some day. No motive for the burning has been alleged. It is admitted that the brothers were on friendly terms and Ambaji himself was made the executor of Hassaji. Any books left by Hassaji must therefore be in the possession of the former. The statement of Ambaji is incredible and I must dismiss it as an absolute myth. The deed of 1921 is not described as a deed of dissolution, but, it is called a partition deed—a fact which negatives the theory that the brothers were partners. Ambaji deposes that he left the drafting of the deed to his younger brother who described the position incorrectly. Without any hesitation, I come to the conclusion that the brothers traded jointly and acquired the property not as partners but as members of a co-parcenary. It follows from this, that on the death of Hassaji his property survives to his sons whose right cannot be defeated by his will.

I have now found:

(1) that the partition of 1880 did not effect a severance between Ambaji and Hassaji;

(2) that ancestral funds formed the nucleus of the property acquired;

(3) that the brothers traded jointly and that they acquired the properties in question as members of a joint family.

I may, however, remark that the finding that there was ancestral nucleus would be quite sufficient to dispose of this case; for, if Hassaji made the acquisitions with the aid of ancestral funds and nothing further was found, his sons would have a right in them by birth. Similarly, the plaintiffs can succeed on the finding that the partition of 1880 did not effect a severance *inter se*, coupled with the further finding that the brothers thereafter jointly made the acquisitions. In this event, the finding that there was ancestral nucleus would be unnecessary. I have, however, recorded findings on all the three questions raised and argued before me, as I entertain no doubt in regard to any of them.

The case depends mainly upon the documents filed and the conduct of the parties as disclosed by them. I have accepted the oral evidence of Krishnaji Rao and of Rajagopal Chetty examined for the plaintiffs, as it is consistent with the documentary evidence and the probabilities of the case. Even the evidence of Ambaji in main points supports the case of the plaintiffs. I do not think it worth while to discuss the oral evidence in greater detail.

In the result, the plaintiffs' claim must be allowed. I declare that the will of Hassaji is inoperative in regard to the joint family property to which the suit relates.

N. S. *Suit decreed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD BUCKMASTER, LORD CARSON, LORD DARLING, LORD WARRINGTON OF CLYFFE, AND SIR LANCELOT SANDERSON.

Madhavrao Ganpatrao Desai and others ... *Appellants** *(Defendants)*

v.

Balabhai Raghunath Agaskar, since deceased, and others ... *Respondents (Plaintiffs.)*

Hindu Law—Construction of deed of trust—Gift to settlor's daughter for life, and after her death to her "male heirs"—Gift of income, carries the whole estate—Rule in Shelley's Case, inapplicable.

The settlor, a Hindu dwelling in Bombay, on the 1st May 1889, 'in consideration of the natural love and affection which he bore to his children and grandchildren' conveyed by deed of that date certain immoveable properties to trustees—upon trust—to pay the income to the settlor for life; and after his death upon certain trusts expressed in the following words:—"As to one-quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishnabai during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike".

On July 14th 1894, the settlor died, Krishnabai survived the settlor and died in 1897, leaving six sons, all of whom were living at the date of the settlement. The question arose as to the true meaning of the gift in favour of Krishnabai and her male heirs. The heirs of the settlor contended that the limitations in favour of her (Krishnabai's) male heirs after her death were contrary to Hindu Law and void, and that in consequence there was a resulting trust in favour of the settlor. *Held* (overruling this contention) that the gift in favour of Krishnabai's male heiss was a valid gift under the Hindu Law, inasmuch as they

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*P. C. Appeal No. 90 of 1926. 29th November, 1927.

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did not take by inheritance from her, and it was by virtue of a wholly independent gift that they were beneficiaries under the deed.

Held, also, that the gift, though in the form of a gift of income, carried the whole estate.

Technical meaning given to similar words in the English Law, disregarded, and the Rule in *Shelley's Case,* (1581) 1 Co. Rep. 93 (*b*) : 76 E. R. 206, held to be inapplicable.

Judgment of the Court of Appeal reversed and that of Mulla, J., restored.

Appeal (No. 90 of 1926) from a decree, dated the 15th April, 1925, of the High Court at Bombay, in its Appellate Jurisdiction (MacLeod, C. J. and Coyajee, J.), varying a decree of the same High Court, in its ordinary original Civil Jurisdiction (Mulla, J.), dated the 16th October, 1924.

The litigation is in respect of a Deed of Trust executed by the late Rao Bahadur Janardhan Wasoodev who was the first Indian Judge of the High Court of Bombay, and the true construction of the deed was the subject-matter for consideration before the Privy Council.

The material facts of the case, as well as the relevant portion of the deed of trust, are given in their Lordships' judgment.

The Trial Judge (Mulla, J.) held that the sons of Krishnabai being all in existence at the date of the settlement took a contingent interest under the gift to her male heirs which vested at her death and he also held that the gift was of an absolute interest in the quarter of the settled property. The following extracts from the learned Judge's judgment are instructive:—

"A person capable of taking under a deed of trust must be such a person as could take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the date of the deed. As to the one-fourth share of the income allotted to Krishnabai's branch it is provided by the deed that it shall be held by the trustees after the death of Krishnabai in trust for her male heirs share and share alike. It was contended for the plaintiffs that the trusts in favour of the male heirs of Krishnabai after her death were void and that there was a resulting trust on Krishnabai's death as regards the one-fourth allotted to her branch in favour of the heirs of Raghunath. Counsel for the plaintiffs argued that a gift to the heirs of a living person was not recognized either by the English or the Hindu Law; that even if it was, it was not a gift to an ascertained class of persons as it should be under the Hindu Law, that the expression 'male heirs' meant the whole body of sons, grandsons, great-grandsons and so on, that the intention of the settlor was that the income should be paid to Krishnabai's sons and then to their descendants in the direct male line and, if so, the gift was bad, since to exclude females from the succession was to exclude the legal

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course of inheritance, and that in any event the gift was invalid as the corpus of the one-fourth share remained in abeyance until Krishnabai's death. In support of those contentions counsel relied on the decisions in *Kumar Tarakeshwar Roy* v. *Kumar Shoshi Shikhareswar* (1) and *Sreemutty Kristoromoney Dossee* v. *Maharajh Norendro Krishna Bahadur* (2). "On the other hand it was argued by Mr. Jinnah, counsel for Krishnabai's heirs, that the estate created by the gift was not inconsistent with the general law of inheritance, nor did it violate any rule of Hindu Law. It was also contended that the deed afforded no indication that the enjoyment of the gift to Krishnabai's male heirs should be of a limited duration and that, on the analogy of the provisions contained in S. 159 of the Indian Succession Act of 1865, the principal as well as the income belonged to the male heirs of Krishnabai.

"The first question to consider is whether a valid gift may be made to the heirs of a living person. A gift to the heirs of a living person is not unknown to the English Law. "The rule is that '*nemo est heres viventis*' and therefore a devise to the heirs of a living person is contingent, unless the term 'heirs' is so qualified by express words or by the general intention of the will as to show that the testator meant by 'heir' the heir apparent or presumptive or some other persons, who will then take as *persona designata*"—Theobald on Wills, 7th Ed., p. 329. So far as I know there is nothing against the general principle of Hindu Law in allowing a Hindu to make a gift of his property to the heirs of a living person provided that the persons entitled to succeed as heirs of that person are in existence at the date of the gift. I think that the gift to 'the male heirs' of Krishnabai is a gift to such of her sons as were in existence at the date of the deed and such as might survive Krishnabai. It is a gift of a contingent remainder. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (3) Knight Bruce, L. J., in delivering the judgment of the Judicial Committee, said, 'whatever may have formerly been considered the state of that (the Hindu) law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu Law, in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist'. In the present case the gift is made to Krishnabai for life and the gift to her heirs is to take effect immediately on the close of a life in being. The two cases cited for the plaintiffs have no bearing on the present case. The terms of gift in both those cases were quite different from those in this case. I therefore hold that the gift in favour of Krishnabai's male heirs is a valid gift under the Hindu Law. All the six sons of Krishnabai that

1. (1883) L R 10 I A 51 : I L R 9 C 952 (P C).
2. (1889) L R 16 I A 29 : I L R 16 C 383 (P C).
3. (1862) 9 M I A 123.

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were in existence at the date of the deed were also in existence at her death, and they became entitled to take under the deed.

"The next question is whether the sons of Krishnabai are entitled to a one-fourth's share in the corpus of the properties or whether they are entitled only to an interest for their respective lives. It is contended on behalf of Krishnabai's heirs that the principle underlying S. 159 of the Indian Succession Act applies to the case and that they were entitled to the one-fourth share assigned to Krishnabai absolutely and not merely the income of that share. Mr. Jinnah also relied on the decision of the Madras High Court in *Krishna Ayyan* v. *Vythianatha Ayyan* (4). On the other hand it was contended for the plaintiffs that Krishnabai's heirs were entitled only to the income of the one-fourth share during their respective lives. As regards S. 159 of the Indian Succession Act it is to be observed that, though it applies to Hindus, there is no corresponding section in the Transfer of Property Act, 1882. The English law draws a distinction in the case of similar dispositions between those contained in a will and those contained in a deed *inter vivos*. As to the former the rule in England is that a devise of realty without apt or any words of limitation passes of the estate the testator had power to devise such realty*, unless a contrary intention appears by the will. The rule contained in S. 159 of the Succession Act is based on the English Law. As to deeds the rule of English Law is that a grant of an equitable estate in realty arising under an express trust without apt words of limitation passes *prima facie* an estate for life merely; but if it appears from the whole deed that it was the grantor's intention to pass the fee simple, that estate will pass......... It seems to me that to determine the extent of interest taken by Krishnabai's male heirs in the estate, one must look to the terms of the deed and discover the intention of the donor. Looking at the deed as a whole, I think it is impossible to escape the conclusion that the settlor did not intend to leave any interest in the properties comprised in the deed undisposed of. On the other hand, there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai. I therefore hold that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely.

"I now proceed to answer the questions:

"No. 1. The male heirs of Krishnabai.... are entitled absolutely to the one-fourth share assigned to Krishnabai.",

"No. 2. The persons entitled to the corpus of the one-fourth share assigned to Krishnabai are the surviving sons of Krishnabai and the heirs of her deceased sons".

The Appeal Court (MacLeod, C. J. and Coyajee, J.) however held that the gift to the male heirs of Krishnabai was void (1) as a gift to a class some of whom might not have been born at the date of the gift, (2) as excluding females and so

*There is apparently a clerical error in this part of the Judgment— K. J. R.

4. (1895) I L R 18 M 252.

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excluding the legal course of inheritance and (3) as made with the object of creating a perpetuity. MacLeod, C. J., in delivering the judgment of the Court, said:—

"The question is—What was the intention of the settlor? His intention is to be sought in his words. The deed is written in the English language; the settlor was himself a lawyer; but, it must be confessed, the instrument is not very easy to construe. In the case of Rughunath and of Krishnabai, he uses these words, his and her 'male heirs'. In the case of Pootlabai's daughter Sonabai the gift is to her "children". In Anandrao's case, it is to his *"male children"*.

"Who, then, were intended to take the estate as Krishnabai's *male heirs?* The parties being Hindus, the donees must be in existence, either in fact or in contemplation of law, at the date of the settlement. In this case there is an uncertainty as to the existence of Krishnabai's *male heirs* at the material time. It was quite possible that none of her sons who were in existence at the date of the deed might survive Krishnabai and a wholly different person or a totally different set of persons answering to that description, *'her male heirs'*, might come into being after that date. If by Krishnabai's *male heirs* the settlor meant her sons who were then in existence, he has—it must be allowed—used signally inapt words to convey that meaning. The settlor, no doubt, was actuated by "the natural love and affection" which he bore "to his children and grandchildren hereafter mentioned"; but that circumstance does not justify the substitution of "Krishnabai's sons" for "Krishnabai's male heirs'. The words 'grandchildren hereafter mentioned' have their application, for the gifts to Sonabai and Anandrao were gifts to the settlor's "grandchildren". The learned Judge observes that 'there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai'. He therefore holds 'that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely'. The settlor however speaks not of her *heirs* but of her *male heirs* and thereby shows an intention to confine the inheritance to males, to the entire exclusion of female heirs; and the disposition is void as 'excluding the legal course of inheritance'. *Kumar Tarkeshwar Roy* v. *Kumar Shoshi Shakhareswar* (1).

"Reading the deed as a whole, it seems to me, that the disposition is also void on the other contention raised by the appellants, namely, that the object of the settlor was to create a perpetuity as regards these properties. The estate itself is not disposed of....... In my opinion the object of the settlor was to create a perpetuity as regards the whole of the trust estate and to limit for an indefinite period the enjoyment of the rents and profits of the estate.

"The result is that the trusts after the death of Krishnabai are invalid".

Sir George Lowndes, K. C., and *E. B. Raikes* for appellants.

W. H. Upjohn, K. C., and S. Hyam for respondents.

1. (1883) L R 10 I A 51 : I L R 9 C 952 (P C).

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Lowndes, K. C.—The Rule in *Shelley's case* (5) does not apply. See *Mithi Bai* v. *Limji Nowroji Banaji* (6). That decision has always been followed in Bombay. It was known to everybody in Bombay in 1889 that *Shelley's Case* (5) was not applicable.

(*Lord Carson*:—Was the settlor aware of it?)

The settlor was a lawyer. He must have known it. The rule in *Shelley's Case* (5) is a law of property or tenure based on feudal considerations. In India we have no distinction between realty and personalty.

(*Lord Darling* :—By recent Act of Parliament the rule in *Shelley's Case* (5) has been rendered obsolete in England). That rule often disappointed the intentions of the parties. See the judgment of Lord MacNaghten in *Van Grutten* v. *Foxwell* (7). Refers to the Transfers of Property Act, and to S. 159 of the Indian Succession Act, 1865.

(*Lord Buckmaster* :—What is the proper meaning of the gift? Is it not a gift to the heirs male of Krishnabai who were living at her death?).

Upjohn, K. C., referred to judgment of Stirling, J., in *Johnson* v. *Johnson* (8).

Lowndes, K. C., cited Manu, Chapter 9, verse 192. It is the whole source of the Hindu Law.

Their Lordships' judgment was delivered by

Lord Buckmaster.

LORD BUCKMASTER.—On May 1st, 1889, Janardhan Wassoodev, a Hindu dwelling in Bombay, in consideration of the natural love and affection which he bore to "his children and grandchildren," made a voluntary settlement in their favour of property chifly consisting of real estate. The children named as beneficiaries were four, Krishnabai, Pootlabai, Raghunath and Kashibai, all of whom were married and had children living at the date of the deed, while Raghunath had both children and grandchildren. The settlement took the form of a conveyance of property to trustees upon trust to pay the income, after deducting Rs. 25 per month for taxes and repairs, to the settlor for life and after his death;* then upon centain trusts expressed in the following words:—

"Upon trust out of the said rents dividends and profits to pay one-fourth part of the net amount to Raghunath Janardhan son of the said

*The punctuation seems to be misplaced; the sentence ought to read "to the settlor for life ; and, after his death, then upon certain trusts etc., etc.,"—K. J. R.

5. (1581) 1 Co. Rep. 93 (b) : 76 E. R. 206. 6. (1881) I L R 6 B 151
7. L R (1897) A C 658, at p. 669.
8. (1887) L R 35 Ch. D. 345.

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Janardhan Wassoodev during his life and from and after the decease of the said Raghunath Janardhan in trust to pay the same to all the male heirs of the said Raghunath Janardhan share and share alike and as to one-quarter of the said rents dividends and profits upon trust to pay the same to my daughter Krishnabai wife of Ganpatrao Moroji Zaoba during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike. And as to another quarter of the said rents dividends and profits upon trust to pay the same to my daughter Pootlabai wife of Nanabhoy Gunpatrao during her life for her sole and separate use and after her death in trust for her child Sonabai wife of Gunpatrao Khunderao and after the decease of the said Sonabai in trust for all or such one or more of the children of the said Sonabai wife of Gunpatrao Khunderao in such share and at such times as the said Sonabai shall by deed or will appoint.' "

Then follow provisions, in relation to Sonabai's share "if there shall be no child of the said Sonabai," in favour of his grandson Anandrao for life and after his death in trust for "the male children" of Anandrao, with trusts over in the event of there being no child of Anandrao, and an ultimate provision in favour of "the right heirs of my son Raghunath." On July 14th, 1894, the settlor died. His daughter Krishnabai died in 1897, leaving six sons, all of whom were living at the date of the settlement. It was in relation to her share that the present dispute arose, the heirs of the settlor contending that the limitations in favour of her male heirs after her death were contrary to Hindu law and void, and that in consequence there was a resulting trust in favour of the settlor. The learned Judge in the Court of first instance decided against this contention, but his judgment was reversed by the High Court of Bombay in its appellate jurisdiction, and hence this appeal.

The appellants are three of the children of Krishnabai; and the respondents are the three other children and the heirs of the original settlor.

It is to be noted that there are different words used in settling the share of Raghunath and Krishnabai on the one hand and the daughters Pootlabai and Sonabai on the other, but this variation of language does not give much assistance in determining the true meaning of the gift in favour of Krishnabai and her male heirs, which is the sole subject of the present consideration. The difficulty is in part caused by the settlor having introduced into his settlement words which have a technical meaning in English law but which they do not possess *application in Hindu law. The use of the words "right

*Obviously some word in the judgment seems to be missing here.—K. J. R.

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heirs" in the ultimate limitation of the share given to Sonabai illustrates this difficulty. The phrase "right heirs" has a distinct meaning in English law and there refers to the heirs at common law as opposed to the heirs by special local customs, but it has no such special significance in Bombay.

In settling the true construction of this deed, therefore, unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. So also must rules like the well-known rule in *Shettley's* case (5) based here upon feudal customs that have had no existence in Bombay. Further, it is to be remembered that a gift to a class of which no member existed at the date of the deed would be bad, and so also a definite attempt to create what in England would be regarded as an estate tail [see *Tagore* v. *Tagore* (9)]. The main part of the respondents' argument depends upon this last consideration. They assert that this was the true meaning of the gift —to the male heirs of Krishnabai after Krishnabai's death—and that it consequently failed. They further argue that the words themselves connote a descendable quality of estate with which it was the intention of the settlor to impress the property either in the gift to Krishnabai or to the male heirs. Their Lordships are unable to accept this view, which is permeated by the suggestion that the words when used in a Bombay settlement are primarily words of inheritance denoting the character of an estate. They do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arises.

The learned Judges in the High Court on appeal, however, took the view that the settlor in speaking of male heirs showed an intention to confine the inheritance to males to the entire exclusion of female heirs, and that consequently the limitation was bad. This conclusion, however, assumes that the words are words of inheritance and not of gift, and with this their Lordships are unable to agree.

It is also pointed out that, as none of Krishnabai's sons might have survived her, a different set of persons would have

5. (1581) 1 Co. Rep. 93 (b) : 76 E R 206.
9. L R I A (Supp. Vol.) p. 47.

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come into existence as her male heirs at her death, but this presents no difficulty if any such persons were living at the date of the deed; if they were not, the gift would fail.

Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show that the estate so conferred was anything but an absolute estate upon such persons. For, there is nothing to suggest, on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income, but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate.

It is, however, argued, and this view found favour with the Court of Appeal, that the subsequent gift of the dwelling-house shows that there was a contrary intention and that the occupation of this house was to continue for an indefinite period. But the gift of this house and its elaborate partition is, in their Lordships' opinion, only a means of providing how the people who had already been created beneficiaries in respect of the other settled estate should be at liberty to enjoy the property, and so far as Krishnabai's male heirs are concerned they are definitely entitled to occupy the share allotted to them and this is all that was decided by the learned Judge of first instance.

For these reasons their Lordships think that the judgment of the Appeal Court was wrong and should be reversed and the judgment of the Judge of first instance restored.

They will therefore humbly advise His Majesty that this appeal ought to be allowed with costs here and in the Court of Appeal.

Solicitor for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*

K. J. R. *Appeal allowed.*

[As regards gifts to unborn persons, see now the Hindu Disposition of Property Act, 1916, and *Mulla's Hindu Law*, 5th Ed., pp. 358, *et seq.*—K. J. R.]

PRIVL COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Bhagwan Singh and others ... *Appellants** (*Defts.*).

v.

Ujagar Singh ... *Respondent* (*Pltff.*).

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Bhagwan Singh v. Ujagar Singh.

Hindu law—Son bound by father's acquiescence in mortgage executed by widow—Attestation of a deed, when an estoppel—Necessity for alienation by Hindu widow—Finding of fact by Trial Court which saw and heard the witnesses, not to be lightly reversed

When a Hindu widow, holding the usual 'widow's estate' in her deceased husband's property, executed a mortgage of it, and it was found that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that she had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters. *Held,* on the evidence, that necessity for the alienation had been established.

Where the managing member of a joint Hindu family consented to and acquiesced in a mortgage executed by a Hindu widow, *held,* that his son, who was not then born, was not entitled to contest the validity of the mortgage, inasmuch as at the time when it was executed he had no interest in the family property, and his father, in asquiescing in the execution of the mortgage, was acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time. The son was, therefore, precluded from challenging the validity of the mortgage in question, and the contention that he was not so estopped, because he did not claim through his father, but as a member of a joint Hindu family to which the Mitakshara Law applied, had, in the circumstances of the case, no force. (*Wasantrao* v. *Anandrao Ganpatrao*, (1904) 6 Bom. L. R. 925 and *Anandrao Ganpatrao* v. *Wasantrao* (1907) 9 Bom. L. R. 595, and *Beer Kishore Suhye Singh* v. *Hur Bullub Narain Singh,* 7 W. R. 502, distinguished).

Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and *by itself* it does not show that he consented to the transaction which the document effects. When, however, in addition to the fact that he attested the deed, there is evidence to show that he consented to and acquiesced in the execution of the document (a mortgage-deed), it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the mortgage by the mortgagor, but also that he consented to the transaction and acquiesced in the mortgage being given.

On a question of pure fact, namely, whether the signature on a certain document was genuine, the Trial Court, which had the opportunity of seeing the witnesses give their evidence, accepted their evidence and decided in favour of the genuineness of the signature. The learned Judges of the High Court, who did not see the witnesses, rejected their evidence and came to the contrary conclusion *Held,* by the Judicial Committee, that there were no cogent reasons for overruling the finding of fact arrived at by the Trial Court.

*P. C. Appeal No. 111 of 1925. 2nd December, 1927

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Bhagwan Singh v. Ujagar Singh.

Judgment of the High Court reversed.

Appeal (No. 111 of 1925) from a judgment and decree of the High Court, Lahore (Harrison and Zafar Ali, JJ.,), dated the 22nd July, 1923, reversing a judgment and decree, dated the 18th October, 1918, of the Subordinate Judge of Gujranwalla.

The material facts are given in their Lordships' judgment.

De Gruyther, K. C., and *Dube* for appellants.

Raikes for respondent.

Their Lordships' judgment was delivered by

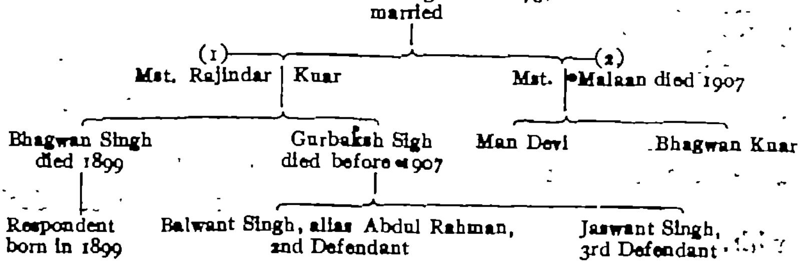
Sir Lancelot Sanderson.

Sir Lancelot Sanderson :—This is an appeal by the legal representatives of Bishen Singh, who was the defendant No. 1 in the suit, against the judgment and decree of the High Court of Judicature at Lahore, dated the 22nd July, 1923. The High Court's judgment reversed the judgment and decree of the learned Subordinate Judge, who tried the suit.

The suit was brought in July, 1917, by the plaintiff, Ujagar Singh, against Bishen Singh and two other defendants, viz., Adbul Rahman Khan, sometimes called Balwant Singh, and Jaswant Singh, sons of Gurbaksh Singh, to recover possession of the land mentioned in the plaint, situate in the Gujranwala District, which was alleged by the plaintiff to have been part of the ancestral property of Hira Singh, the grand-father of the plaintiff.

The plaintiff alleged that the defendants 2 and 3 had a half-share in the said property, but that, by reason of a private partition, they had taken other lands in exchange for their share in the suit land, that consequently they had no further interest therein, and that they have recognised the claim of the plaintiff to the lands in suit, which had been held by Mussamat Malan.

The defendant, Bishen Singh, was in actual possession of the lands in suit, and relied upon a mortgage executed on the 6th May, 1896, by Mussamat Malan, who was one of the widows of Hira Singh. A pedigree of the family is included in the respondent's case in this appeal, and is as follows:—



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The plaintiff alleged that Mussamat Malan had no power of alienation of the land in dispute and that he was in no way bound by the mortgage.

The defendant, Bishen Singh, then put in a further pleading, alleging that Mussamat Malan mortgaged the land for valid necessity, for payment of debts, and for expenses incurred in connection with the marriages of her daughters.

The defendant further stated that if the mortgage money, interest and costs were paid he had no objection to release the land.

The learned Subordinate Judge held that Mussamat Malan had limited powers of alienation but that the mortgage was executed for valid necessity, and that it was binding on the plaintiff. He held further that the suit was barred by the Indian Limitation Act.

In the ordinary course the plaintiff's suit would have been dismissed, but the learned Judge said that

"Having regard to the fact that the case has been dragged on for pretty long time, and the defendant No. 1 is not disinclined to redeem the lands provided he is paid his charges and the costs of improvements, I think the plaintiff may be allowed to redeem the lands in this case."

He accordingly made a decree in the plaintiff's favour for possession of the land in dispute, provided the plaintiff paid Rs. 8,734-4-0 in addition to the cost of buildings to be determined thereafter which had been built by the defendant, Bishen Singh; and he directed that the parties should bear their own costs.

Both the plaintiff and the defendant, Bishen Singh, appealed to the High Court; the two appeals were heard together, and disposed of by one judgment on the 22nd July, 1923.

The learned Judges of the High Court were of opinion that no necessity whatever had been proved for the mortgage, they therefore allowed the plaintiff's appeal, and gave the plaintiff a decree for possession of the land in suit without any payment.

The defendant's cross-appeal was dismissed, and it was directed that his representative should pay the plaintiff's costs in both appeals and in the Trial Court.

The High Court did not deal with the question of Limitation; but this is now of no importance in view of the fact that the learned counsel who argued this appeal on behalf of the appellants stated that he did not rely on that point.

In the first place the question of necessity may be dealt with.

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The learned Judges of the High Court came to the conclusion that Mussamat Malan had ample funds to meet the expenses of the marriages of her daughters, and that the defendant No. 1 had failed to establish any necessity whatever for borrowing money.

This opinion was largely based upon the interpretation which the learned Judges placed upon what is referred to in the judgment as "the estimate."

Their Lordships were informed that the so-called "estimate" is contained in a statement made by one Amir Shah before a Munshi in certain proceedings in which Bishen Singh was the decree-holder and Mussamat Malan was the judgment-debtor. The learned Judges said that—

> "At the time, therefore, that the money was borrowed the income of the widow, far from having been Rs. 1,921, as shown in the estimate, must have been approximately Rs. 3,350, thus leaving a margin over and above her ordinary expenditure of over Rs. 1,300 per annum."

It was argued on behalf of the appellants that the above-mentioned "estimate" did not show the widow's income to be Rs. 1,921, as stated by the learned Judges, but that it appeared from the statement that the income available to the widow, Mussamat Malan, in respect of the lands referred to therein was Rs. 420-5-2 only, and that her expenses amounted to about Rs. 396.

It was admitted by the learned counsel, who appeared for the plaintiff-respondent, that in this respect the learned Judges of the High Court had made a slip, and that he could not support the finding of the High Court on this point on the grounds stated in the judgment.

The hearing was adjourned in order that the learned counsel should consider whether the finding of the High Court on the issue of necessity could be supported on other materials in the record.

Having heard the learned counsel further their Lordships are of opinion that no sufficient ground has been shown for interfering with the finding of the learned Subordinate Judge on this question, *viz.*, that the income from the lands at the material time was hardly sufficient to meet the ordinary expenses of the family, that Mussamat Malan had no alternative and was compelled to resort to borrowing in order to meet the extraordinary expenses of the marriages of her daughters, and that the mortgage deed was executed for consideration and valid necessity.

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It was, however, further argued by the learned counsel for the plaintiff-respondent that, even assuming the finding of the learned Subordinate Judge on the question of necessity to be correct, that did not dispose of the case, and that the plaintiff was entitled to hold the decree, which he obtained in the High Court, on other grounds.

It appears that Hira Singh died in 1875, leaving two widows, viz., Mussamat Rajindar Kaur and Mussamat Malan; two sons by the first-named wife, *viz.*, Bhagwan Singh and Gurbaksh Singh; and two daughters by Mussamat Malan.

On the 17th December, 1887, an agreement was entered into by Gurbaksh Singh, Mussamat Malan, Mussamat Rajindar Kaur, and Raiman Singh, as guardian for Bhagwan Singh, who was then a minor.

It was recited that Hira Singh, deceased, owned the lands therein described, that they were then entered in the names of Gurbaksh Singh and Bhagwan Singh in the official papers, that for settlement of mutual disputes and to make arrangements for maintenance and expenses the parties had agreed to divide the entire estate into the following shares, *viz.* :—

Gurbaksh Singh one-fourth share, Bhagwan Singh (minor) one-fourth share, Mussamat Malan with her daughters till death, without power of alienation one-fourth share, and Mussamat Rajindar Kaur till her death, without the power of alienation one-fourth share.

It was agreed that the lands in dispute were part of the one-fourth share allotted by the agreement to Mussamat Malan.

The agreement further stated as follows:—

"As for the marriage of the daughters of Mussamat Malan, which is yet to be celebrated, a mutual settlement in regard to the expenses thereof shall at the time of the marriage be made through a panchayat."

The agreement was executed "by way of a deed of mutual partition," so that no dispute might arise.

It was argued on behalf of the plaintiff-respondent that Mussamat Malan had not the estate of a Hindu widow, that no question of necessity for alienation arose, but that she had merely a one-fourth share in the estate for her life, with no power of alienation whatever, and that, therefore, the mortgage which she executed in favour of Bishen Singh was invalid and of no effect.

One answer set up on behalf of Bishen Singh to this case was that, after the death of Hira Singh, entry as to ownership

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was made in the Revenue papers according to the aforementioned shares, that he had no knowledge of the agreement, and that such agreement was never acted upon.

The defendant further alleged that the plaintiff's father and the defendants 2 and 3 admitted by their acts and conduct that no such agreement existed, and that, if there was one, it was cancelled.

Issues were raised at the trial in respect of this point, *viz.*: 4 (*a*) Did the plaintiff's father attest the deed (*i.e.*, the mortgage deed), and by so doing, was he estopped from challenging its validity, and was the plaintiff for this reason estopped from contesting it?

4 (*b*) Did the plaintiff's father and defendants 2 and 3 acquiesce in the alienation in favour of defendant No. 1 by their conduct?

The learned Subordinate Judge decided these issues against the plaintiff, and held that the plaintiff was debarred from contesting the validity of the mortgage.

The High Court held that the evidence given on behalf of the defendant was not sufficient to establish the genuineness of the signature of the plaintiff's father on the mortgage deed.

Evidence on this point was given by Bishen Singh, the defendant, who said that Bhagwan Singh (the father of the plaintiff) asked him to get the deed written and that he would attest it and get it registered, and that the mortgage deed was executed with the consent of the plaintiff's father, and that it was attested by him.

Amir Shah, a patwari, confirmed this evidence, and said that Bhagwan Singh signed the mortgage deed in his presence, that Mussamat Malan and Bhagwan Singh consulted together, and that in order to pay off debt they mortgaged the lands.

The learned Shbordinate Judge had the opportunity of seeing these witnesses give their evidence, and he accepted it.

The learned Judges of the High Court, who did not see the witnesses, rejected their evidence as insufficient to establish the genuineness of Bhagwan's signature on the mortgage deed, for the reasons stated in this judgment.

Their Lordships are unable to agree that the reasons given by the High Court are sufficient to justify the over-ruling of the finding of fact arrived at by the learned Subordinate Judge on this point, and they are of opinion that the signature of Bhagwan Singh as a witness to the mortgage deed must be taken to be a genuine signature for the purposes of this case.

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This does not conclude the matter, for attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects.

In this case, however, in their Lordships' opinion, there is abundant evidence, in addition to the fact that Bhagwan Singh attested the deed, to show that he consented to and acquiesced in the execution of the mortgage by Mussamat Malan. There is the evidence, to which reference has already been made, which goes to show that Bhagwan Singh not only consented to the transaction, but took an active part in the consultations which resulted in the mortgage of the lands by Mussamat Malan.

Further, there is the significant fact that in June, 1896, *i.e.*, a month after the mortgage was executed, Bhagwan Singh entered into an agreement with Bishen Singh, whereby in effect he obtained an option to have the mortgage transferred to him.

On the consideration of all the evidence their Lordships are of opinion that Bhagwan Singh not only witnessed the execution of the mortgage by Mussamat Malan, but also that he, in his capacity of managing member of the joint family, consented to and acquiesced in the mortgage being given, and that this appeal must be decided upon the basis of that finding.

The learned counsel for the plaintiff-respondent further contended that, even if Bhagwan Singh would have been estopped from denying the validity of Mussamat Malan's mortgage, the plaintiff is not so estopped, because the plaintiff does not claim through his father, but as a member of a joint Hindu family to which the Mitakshara law applies, and he cited the cases of *Wasantrao* v. *Anandrao Ganpatrao* (1), *Anandrao Ganpat Rao* v. *Wasantrao* (2) *and Beer Kishore Suhye Singh* v. *Hur Bullub Narain Singh* (3).

These decisions are not applicable to the facts of this case. It appears from the plaint that the plaintiff was only five months old at the time when Bhagwan Singh died, *viz.*, in 1899. The mortgage was executed in May, 1896; it is therefore clear that the plaintiff was not born at the time when the mortgage was executed; so that even if the Mitakshara law applies without any qualfiication, the plaintiff is not entitled to contest the validity of the mortgage, for, at the time when it was executed, the plaintiff had no interest in the family property, and Bhagwan Singh acquiesced in the execution thereof, and in the circumstances of

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1. (1904) 6 Bom. L. R. 925. 2. (1907) 9 Bom. L. R. 595.
3. 7 W. R. 502.

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this case it is clear that he was acting not only on behalf of himself, but also on behalf of all the members of the family who were alive at that time.

The result is that the plaintiff's claim fails and that the appellants are entitled to possession under the mortgage, and such consequential relief as can be given under S. 144 of the Code of Civil Procedure.

Their Lordships, therefore, will humbly advise His Majesty that this appeal should be allowed, that the judgment and decree of the High Court, dated the 22nd July, 1923, should be set aside, that the plaintiff's suit should be dismissed, and that the plaintiff should pay the costs of the appellants in this appeal and the costs of the defendant Bishen Singh and his legal representatives in both the Courts in India.

Solicitors for appellants : *H. S. L. Polak.*

Solicitors for respondent : *Ranken, Ford & Chester.*

K. J. R. *Appeal allowed.*

Reporter's Note : The plaintiff's family in the above case were Jat Zamindars (*Sudras*) and were governed, in matters of alienation, not by the orthodox Hindu Law, but by the customary law of the Punjab applicable to agricultural classes. As Sir John Edge observed, in delivering the judgmnet of the Board in *Ramkishore v. Jainarayan,* (1921) L. R 48 I. A. 405 : I. L. R. 49. Cal. 120 : 42 M L J 80 (P C), "in some parts of Northern India customs which are at variance with the law of the Mitakshara, as recognized by the School of Benaras, have been for long consistently followed and acted upon". The distinction here pointed out is not adverted to in their Lordships' judgment, now reported, but apparently nothing material turned upon it. K. J. R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE REILLY.

The Public Prosecutor ... *Appellant**

v.

Palaniyandi Naicken ... *Accused.*

The Public Prosecutor v. Palaniyandi Naicken.

Madras Local Boards Act (XIV of 1920), *Ss* 3 (18), 159 (1) *&* 207 (2)—*Road poramboke—Encroachment upon—Conviction for—Legality—Encroachment not causing obstruction to public—Public road in S.* 3 (18) *—Meaning of.*

Public road, under S. 3 (18) of the Local Boards Act, includes land which lies on either side of the roadway up to the boundaries of the adjacent property. It includes land which is registered as "road poramboke" and is vested in the District Board. The public have a right of way over every part of land registered as road poramboke, and a person who encroaches upon road poramboke and who does not, even after notice served upon

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*Crl. Appeal No. 540 of 1927. 19th October, 1927.

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him and after a conviction, vacate the encroachments, is liable to conviction under S. 159 (1) and S. 207 (2) of the Local Boards Act, notwithstanding that the encroachment does not cause any obstruction to the public.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the order of the Court of the Joint Magistrate of Kumbakonam in C. A. No. 5 of 1927 on his file (C. C. No. 197 of 1926 on the file of the Court of the Stationary Second Class Magistrate, Papanasam).

The Public Prosecutor for appellant.

T. S. Krishnaswami amicus curiae for accused.

The Court delivered the following

Madhavan Nair, J.

JUDGMENT :—*Madhavan Nair, J.* :—The facts are briefly these; the accused encroached on Road No. 18 within the limits of Melattoor V. Sethi Resta in the District Board, Tanjore, and notice was served upon him under S. 159 (1) of the Local Boards Act, to vacate the encroachments. This was disobeyed and he was convicted by the Sub Magisterate of Papanasam in C. C. No. 240 of 1925. He preferred no appeal against this conviction. He did not, however, remove the encroachment; and, as the offence continued, the present case was brought against him under S. 159 (1) and 207 (2) of the Madras Local Boards Act. The Stationary Sub-Magistrate of Papanasam found him guilty and fined him Rs. 61. This conviction was set aside on appeal. This present appeal has been preferred by the Public Prosecutor against the acquittal of the accused by the Joint Magistrate of Kumbakonam.

P. W. 2, the Local Fund road maistry, deposed that the encroachment in question lies outside the line of avenue trees on the road and on land which is required for road conservancy purposes and that there is no obstruction to traffic. The conviction was set aside by the learned Joint Magistrate, mainly on the ground that the "public road", as defined by S. 3 (18) of the Local Boards Act, means the actual road over which the public have a right of way and that none of the clauses of S. 3 (18) is wide enough to include a road poramboke used for conservancy purposes. I think that the conclusion of the learned Magistrate is based upon a misreading of S. 3 (18). Sub clause (*c*) of that section says a 'public road' includes land which lies on either side of the roadway up to the boundaries of the adjacent property. The land which is in question in this case clearly comes within this description. It is registered as "road poramboke" and is vested in the District Board. The public have a right of way over every part of land registered as road poramboke. The

fact that the encroachment does not cause any obstruction to the public does not in the slightest degree affect the case. The District Board which owns the public roads has every right to ask those who encroach upon them to remove the obstruction.

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Madhavan Nair, J.

It was argued on behalf of the accused that he had perfected his title to the land in question by adverse possession for over thirty years. This ground was raised in the grounds of appeal to the Lower Appellate Court, but in the judgment we find no discussion of the point. The judgment is confined exclusively to a consideration of the question whether the encroachment was on the public road as defined in S. 3 (18). It appears to us that this point has not been pressed before the learned Magistrate; I agree with the Sub-Magistrate that the evidence does not conclusively show that the case of adverse possession has been made out by the accused.

In these circumstances I set aside the acquittal and convict the accused of the offence under S. 159 (1) and S. 207(2) of the Madras Local Boards Act and sentence him to pay a fine of Rs. 61, or, in default, to suffer simple imprisonment for two months.

Reilly, J.

Reilly, J. :—I agree. In regard to the definition of a "public road" in the Madras Local Boards Act, it appears to me that *prima facie* the public have a right of way over every part of road poramboke. Therefore, if we find a piece of road poramboke which lies between the roadway and the boundary of adjacent property, that will be a public road as defined in the Act, unless it is shown that in some way the public have lost their right of way over it.

A. S. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Yelumalai and another by next friend M. Mariappa Naicker ... *Plaintiffs**

v.

Kuppammal and others ... *Defendants.*

Yelumalai v. Kuppammal

Civil Procedure Code, O. 33, Rr. 10 *and* 11—*Pauper suits filed on Original Side of High Court—Applicability to—Rr.* 10 *and* 11 *if* ultra vires *of Indian Legislature—Madras High Court-Fees Rules (O. S.) O. II R. 2*

Rr. 10 and 11 of O. 33 of Civil Procedure Code are applicable to suits by paupers filed on the Original Side of the High Court. There is no inconsistency between the Court-fee rule, O. 2, R. 2 (2), made by the

*In the matter of the order in C. S. No. 395 of 1925 as to court-fee. 16th December, 1927.

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High Court for being used and observed on the Original Side, and Rr. 10 and 11 of O. 33 of Civil Procedure Code.

There is nothing to prevent the Indian Legislature from making rules pertaining to Court-fees applicable to the Original Side. Rr. 10 and 11 of O. 33 of Civil Procedure Code are not therefore *ultra vires* of the Indian Legislature.

V. V. Devanathan for plaintiffs.

V. S. Govindachari, K. Narasimha Aiyar and *C. Venkatasubbaramayya* for defendants.

The Advocate-General for Government.

The Court delivered the following

JUDGMENT :—A question of some importance has been raised in this case by Mr. Devanathan. He contends that O. 33, Rr. 10 and 11, Civil Procedure Code, do not apply to suits by paupers filed on the Original Side of the High Court. As this question must arise frequently, I have directed notice to the Government Solicitor and the learned Advocate-General has appeared and argued the point. To deal with this contention, it is necessary to examine several provisions of law. The broad question is, to what extent do the provisions of the Civil Procedure Code apply to the High Court in the exercise of its ordinary original civil jurisdiction? S. 117 which occurs in Part IX provides that, save as provided in that Part or in Part X or in rules, the provisions of the Code shall apply to High Courts. S. 121 runs thus:

"The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part".

S. 129 deals with the power of Chartered High Courts to make rules as to their original civil procedure. It says that, notwithstanding anything in the Code, any such High Court may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit. Then we come to O. 49 which specifies certain provisions of the Code inapplicable to the Original Side of the High Court.

The result of these various provisions is, that the Civil Procedure Code is generally applicable to the High Court in the exercise of its ordinary original civil jurisdiction, except where it is specifically excluded or unless the High Court itself has made rules superseding any particular provisions of the Code.

Now turning to the rules of the Original Side, we find there is a specific rule to the same effect. Order 1, R. 3, provides *inter alia* that the provisions of the Code so far as

they are inconsistent with the rules enacted shall stand repealed and superseded. The question then is, are rules 10 and 11 of O. 33, Civil Procedure Code, applicable or not to the Original Side? Their application has not been excluded by the Code itself; on the contrary, there is sufficient indication that they are intended to be applied. O. 49, while specifying the rules not applicable to the Original Side, mentions among them, R. 7 of O. 33, thus implying that the other rules of the same Order do apply.

In regard to pauper suits, there are some provisions in the Original Side Rules dealing with them; they are Rr. 14 to 18 of O. 8. These rules are very incomplete and they do not deal with various matters dealt with in the Code. There is nothing inconsistent in these rules with O. 33, Rr. 10 and 11, Civil Procedure Code. As a matter of fact, the matters dealt with by the latter have not been dealt with under the Original Side Rules at all and from what I have said, it follows that O. 33, Rr. 10 and 11, Civil Procedure Code, are applicable to the Original Side.

The next part of Mr. Devanathan's argument is based upon certain Fees Rules made by the High Court for being used and observed on the Original Side. O. 2, R. 2 (2) runs thus :—

"If an application for leave to sue, defend, or appeal *in forma pauperis* is granted, no fee shall be levied by the Registrar or the Sheriff, in respect of any proceedings by, or on behalf of, the pauper, except the fees chargeable upon the said application and any proceedings incidental thereto".

Mr. Devanathan contends that this is an express rule providing that no fee shall be levied by the Registrar in respect of any proceeding taken by a pauper, and he proceeds to argue that it therefore follows that O. 33, Rr. 10 and 11, are inconsistent with this provision, as they contemplate payment of court-fees in a pauper suit. The answer to this to my mind is simple. The court-fee rule only says that no fee shall be levied by the Registrar, which means, no fee shall be levied by him (taking the case of a plaint) at the time of its being filed. But this does not say that the pauper litigant cannot be directed to pay to the Government, at the termination of the suit, the court-fees, which he was excused from paying at the outset. The court-fee rule speaks of levying a court-fee by the Registrar; whereas the rules in the Code deal with payment of court-fees in connection with costs incurred in the course of litigation. I do not find any inconsistency between the

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court-fee rule in question and O. 33, Rr. 10 and 11, Civil Procedure Code. Then remains the contention that the last mentioned provision is *ultra vires* of the Indian legislature. To deal with this argument, it is first necessary to refer to Ss. 3 and 4 of the Court-Fees Act, which show that that Act generally does not govern the court-fees chargeable on the Original Side ; for, S. 3 enacts that the fees payable on the Original Side shall be collected in the manner provided in the Act. The section, therefore, assuming that the court-fees chargeable are to be determined under some other provisions of the law, goes on to specify the manner in which such court-fees shall be collected. It is the High Court that has the power to fix the court-fees payable on the Original Side and it derives that power from either S. 106 or S. 107 of the Government of India Act. It is generally taken for granted that the section that applies is the latter section which has replaced S. 15 of the High Courts Act, 1861. I must say that the wording of S. 107 as well as the marginal note against that section gives one the impression that the table of fees mentioned in clause (*e*) thereof refers to subordinate Courts and not to the High Court itself. S. 15 of the High Courts Act which this section has superseded is less open to this criticism than the latter section. However that may be, S. 106 is the general section that deals with the jurisdiction of the High Court, and the terms of that section are wide enough to include the special powers mentioned in S. 107. It does not therefore signify whether the power to settle court-fees is derived from S. 106 or from S. 107; for, in either case the power is ultimately to be traced to S. 106 itself. If that be so, the next point to note is, that S. 106 is one of the provisions of the Government of India Act, which the Governor-General in Council may repeal or alter. (See Fifth Schedule to that Act). Thus, there is nothing to prevent the Indian legislature from making rules pertaining to court-fees applicable to the Original Side. I am therefore unable to accept the argument that O. 33, Rr. 10 and 11, are *ultra vires* of the Indian legislature. Therefore, the order that I made in the suit directing court-fees to be paid to government will stand.

A. S. V. *Order as to Court-fees not interfered with.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

Muthukathan Ambalagaran and two others ... *Appellants** (*Respts-Sureties.*)

v.

Gopinada Aiyar ... *Respondent* (*Petr.-Plaintiff*).

Muthukathan Ambalagaran *v.* Gopinada Aiyar.

Surety bond—Operation of—Commencement of—Date on which bond is filed in Court—Date on which it is accepted by Court.

The appellants executed a surety bond by which they bound themselves to pay the decree amount if the defendant who was arrested in execution of the decree did not file the schedule within 30 days from the date thereof. The bond, which was not dated, was filed in Court on 19th March, 1925, but it was not, owing to the decree-holder's objection as to the competence of the sureties, accepted on that date; and the defendant was not released on that date. It was subsequently tested, and was accepted on 23rd March, 1925, and the defendant was on that day released. The defendant filed an insolvency petition within 30 days from 23rd March, 1925, but more than 30 days after 19th March, 1925.

Held, that the surety bond became operative only from the date on which the bond was accepted by the Court, and that, as the insolvency petition was filed within 30 days of such acceptance, there was no forfeiture of the bond, and the sureties did not become liable thereunder.

Appeal against the order of the District Court of Trichinopoly, dated the 2nd day of December, 1925, and passed in Appeal No. 302 of 1925, preferred against the order of the Court of the District Munsif of Kulitalai in E. P. No. 885 of 1925 (O. S. No. 152 of 1924 on the file of the Court of the Additional District Munsif of Kulitalai).

S. Panchapakesa Sastri for appellant.

K. G. Srinivasa Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The question in this case is whether the appellants-sureties are liable on the bond executed by them. The bond is not dated but was filed in Court on the 19th March, 1925, and the appellants bound themselves to pay the decree amount if the defendant who was arrested in execution of the decree did not file the schedule in 30 days or did not prosecute the proceedings after filing the schedule or if he was not produced in Court whenever the Court called upon the sureties to produce him. The petition for releasing the defendant was filed on the 19th and on the same date the sureties put in this bond. The decree-holder's vakil

*A. A. A. O, No. 9 of 1926, 21st October, 1927.

however did not consent to the release, but stated that he wanted time to ascertain about the competence of the sureties. The Court passed the following order :

> "The decree-holder's vakil wants time to ascertain about the competency of the sureties. Call on 23rd March, 1925. Let it be also tested in the meantime".

On 23rd March, 1925, the security bond was accepted by the Court and the following order was passed :

> "Security furnished and the security is accepted and so the man is released".

It is admitted that the defendant applied for the benefit of the Insolvency Act, within a month from 23rd March, 1925, the date when the security bond was accepted and the defendant was released. Execution was taken out against the sureties on the ground that the insolvency petition ought to have been filed within one month from 19th March, 1925, and that being out of time by one day, 20th March being a holiday, the sureties are liable to pay the decree amount under the terms of the bond. This contention was upheld by the District Judge. We do not think that the sureties are liable, as the surety bond became operative from the date when the surety bond was accepted by the Court. It is difficult to see how the liability of the sureties began immediately they presented the bond on the 19th. The Court did not accept the bond, it did not release the defendant, he was kept in custody till the 23rd and it made the acceptance of the bond condition on the suretyship being satisfactory. To hold that the obligation to file the schedule began on the 19th would involve holding that the contract of suretyship began to operate before its acceptance. It is argued for the respondent that as the defendant had 27 days within which to file the schedule there was ample time for him to do so and it was not a case of impossibility of performance. The question is not impossibility of performance, but the question is as to the date when the contract became operative. That date must be the date when the contract was accepted by the other side. The surety bond is a contract between the Court and the parties and there is no reason to put this contract on any different footing There is no date fixed in the contract as the date on which he should file the schedule, and the words "இது முதல்" in the contract which may be translated 'from this date' had to be put in there, because the sureties filed the document on that day and they assumed that the document would be accepted and the defendant released on that day. If for any reason, whether due to the action of the Court or the vakil on the other side, the

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acceptance of the document is postponed, we see no reason for holding that the liability began from a date anterior to the acceptance of the contract. 30 days time is fixed by the Code in order to enable the defendant to prepare and file the schedule. To hold that the acceptance can be delayed and yet the period is to run before acceptance would be tantamount to holding that the defendant should file the schedule within a period shorter than 30 days allowed by law and stipulated by the sureties, and it may be that, if the sureties were told that the defendant had to file the schedule within a much shorter time, they might not have consented to be sureties, as any abridgment of time increases the risk. We think that the proper way to construe a contract like this is that the contract runs from the date of the acceptance by the court and 30 days begin from the date when the contract is accepted, unless there is something clear on the document to show that the parties contemplated the possibility of a lesser time being allowed for the filing of the schedule.

We would allow the appeal and dismiss the execution application against the appellants with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Athimoolam Servai and another .. *Petitioners* (Petitioners)*

v.

E. M. Gopalakrishna Kone ... *Respondent (Respondent).*

Athimoolam Servai v. Gopalakrishna Kone.

Madras District Municipalities Act (V of 1920)—S. 52, R 11—Scope of—Election inquiry—Offence under S 52, R. 11—Jurisdiction and duty of Court to inquire into—Judge holding enquiry—Not a persona designata.

Petitioners applied to set aside the election of the counter-petitioner to a Municipal Council, alleging that he had by deceitful means procured the improper entry of names in the electoral roll. The Sub-Judge declined to go into the question, holding that, as regards the electoral roll, the orders passed by the revising authority were final, and the validity of the registers could not be questioned in election proceedings.

Held, that the Sub-Judge erred in circumscribing the scope of R. 11 of S. 52 of Act V of 1920 in that manner.

The plea that the successful candidate had by deceitful means procured the improper entry of names in the electoral roll could not have been urged before the revising authority and ought to be gone into by the Court to see if the offence described in S. 52 had been committed.

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*C. R. P. No. 389 of 1926. 24th March, 1927.

Athimoolam Servai v. Gopalakrishna Kone.

Held further, that the Sub-Judge holding the election inquiry was not a *persona designata*, and that his order could be interferred with in revision.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Madura, dated 22nd January, 1926, in O. P. No. 22 of 1925.

K. Raja Aiyar and *V. Ramaswami Aiyar* for petitioners

A. V. Viswanatha Sastri for respondent.

The Court delivered the following

JUDGMENT :—The petitioners seek to revise the judgment of the Additional Subordinate Judge of Madura in O. P. No. 22 of 1925.

The petitioners (two electors) were applying to set aside the election to the Madura Municipal Council of the counter-petitioner. On the day of hearing they were not ready with their witnesses, and the Court summarily dismissed their petition. The witnesses then available should have been present, and they have no legitimate grievance on this account. But, and this is the gravamen of the petition, the main bulk of their evidence had already been shut out by the order of the court on 12th December, 1925. They alleged that the counter-petitioner had by deceitful means procured the improper entry of names in the electoral roll, an election offence under S. 52 of Act V of 1920. R. 11 of the Rules for the decision of election disputes provides that the returned candidate may be unseated if in the opinion of the Judge he has committed an offence described in S. 52. But the learned Subordinate Judge declined to give any opinion in the matter, because, as regards the electoral roll, the orders passed by the revising authority shall be final [Rule for preparation of electoral rolls, 7 (*b*)] and no failure to observe dates or directions shall entitle any one to question the validity of the registers in election proceedings [R. 8 (*e*)]. He holds therefore that S. 52 in R. 11 can only apply to an offence in regard to an electoral roll after its publication.

There seems to be no necessity to circumscribe the scope of the rule in this manner. The revising authority is only concerned with the electoral roll as such, adding names which ought not to have been omitted, and removing names which ought not to have been inserted; and the list of names so drawn up by that authority is final. It is no concern of the revising authority how the mistakes occurred, whether on account of fraud or oversight, and these are questions which it need not

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and cannot decide. In the present case it is alleged that some 200 voters were wrongfully entered as paying profession tax. If the petitioner had established his point before the revising authority, he could have got those names removed, and, as he did not do so, he cannot get them removed now. He cannot now advance the plea that 200 voters should be eliminated, thereby giving him a majority, nor is that his case. All he could urge is that the successful candidate by deceitful means procured the improper entry of names in the electoral roll; and this could not have been urged on any earlier occasion. The distinction between the two pleas becomes clear if the result is borne in mind. Suppose that the petitioner only succeeds in this enquiry in establishing the fact that 200 voters are improperly entered upon the electoral roll, without proving the counter-petitioner's deceitful connivance, it will not help him in the slightest degree, whereas before the revising authority, he could have got the names struck off, without any question of deceitful connivance ever having arisen. Therefore, the Court cannot refuse jurisdiction in this matter, and must go into the question whether the offence described in S. 52 was committed. Accordigly, his order is set aside, and the learned Subordinate Judge is directed to dispose of the petition in the light of the above observations. The charge connected with S. 52 can be re-opened, but not the other charges for which, through the petitioner's own default, eivdence was not forthcoming. On behalf of the counter-petitioner, the power of this Court to interfere is questioned. There is direct authority in *Ahamad Thambi Maracayar* v. *Basava Maracayar* (1), which follows *Ramaswami Goundan* v. *Muthu Velappa Goundan* (2), on the principle that in this matter the District Municipalities and Local Boards Acts are analogous. I agree, and that analogy attracts the authority of the Full Bench ruling in *Parthasaradhi Naidu* v. *Koteswara Rao* (3). In that case the learned Chief Justice was led to decide that the Judge was not a *persona designata* by a reference to two rules, a rule permitting him to transfer the inquiry to a subordinate Court, and a rule that the ballot papers shall be sealed and not again inspected except under the orders "of an election or other competent Court". The first of these rules is not repeated in the Rules under the District Municipalities Act, but the second is IX (2) of the Rules for the election of Chair-

1. (1922) I L R 46 M 123 : 44 M L J 69. 2. (1922) 44 M L J 1.
3. (1923) I L R 47 M 369 . 46 M L J 201 (F B).

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man and Vice-Chairman of Municipal Council and R. 26 (1) of Rules for the conduct of elections of Municipal Councillors. In fact, these are the rules actually quoted by the learned Judge; R. 12 (2) of the Rules for the election of members of District Boards by Taluq Boards or R. 28 (1) of the Rules for the conduct of elections of members of Taluk and Union Boards have a slightly different wording, "orders of a competant court". I see no reason therefore to hold that the Full Bench ruling on the Local Boards Act does not equally apply to the District Municipalities Act. Moreover, if Government had intended the election inquiry to be held by a *persona designata*, they could easily have recast the rule to put this beyond all doubt as soon as their original drafting had been interpreted in a contrary sense. In matters of this sort acquiescence is the Court's best guide to intention.

A. S. V. *Order set aside and petition remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

Ramappa Naidu and another ... *Appellants** (*Petitioners 2 and* 3)

v.

Lakshmanan Chettiar and others ... *Respondents* (*Respts.*).

Ramappa Naidu v Lakshmanan Chettiar.

Will—Construction—Direction to build choultry and instal family deity—Provision for the transfer of patta of properties in the name of the deity—Direction that son and his heirs should conduct specified charities and enjoy the rest of income—Properties if absolutely dedicated to trust or only burdened with the trust—Adjudication of testator's son as insolvent—Properties when vest in the Official Receiver—Provincial Insolvency Act (V of 1920), S. 4.

A testator by his will directed that his son shall construct a choultry on a site belonging to him and instal in it the picture of his family deity, that the revenue authorities shall transfer the patta for a specified portion of his properties in the name of that deity, that his son and his heirs from generation to generation according to the rule of primogeniture shall, without alienating these properties, enjoy them and conduct the charities which were specified in the schedule and utilise the balance of the income for family purposes, and that his son shall inherit all his other properties. It appeared that the charities which were detailed in the schedule would not consume any considerable portion of the income even if they were conducted on a lavish scale, and that a very large amount of the income would be left intact for enjoyment by the family. It was not satisfactorily shown what were the other properties that were given to his son by the last clause of the will. After the death of the testator, his son became an insolvent

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*A. A. O. No. 194 of 1926. 3rd August, 1927.

Ramappa Naidu v. Lakshmanan Chettiar.

Held, that the properties covered by the will were not absolutely dedicated to the trust but were only charged with carrying out the trust, as the dominating purpose and intention of the testator in executing the will was to provide for the members of his family, and the maintenance and conduct of the charity was only of subsidiary importance, and therefore, the properties vested in the Official Receiver for the benefit of the creditors of the insolvent.

Appeal against the order of the District Court, Negapatam, dated the 31st March, 1926, in I. A. No. 661 of 1924 in I. P. No. 10 of 1924.

C. S. Venkatachariar for appellants.

S. T. Srinivasagopalachariar for *K. S. Desikan* for respondents.

The Judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J. :—This is an appeal against an order passed by the District Judge of East Tanjore under S. 4 of the Provincial Insolvency Act declaring that the properties forming the subject matter of this appeal would vest in the Official Receiver for the benefit of the creditors.

The dispute relates to about 68 acres and odd of property which belonged to one Chinnaswami Naidu. He died leaving a will in favour of his son in which, generally speaking—we will refer to the contents of the will in detail later —he called upon his son to maintain a choultry and carry on in it the worship of their family deity, meeting the expenses from the income of the property, with liberty to utilize the balance of the income for family purposes. His son became an insolvent. The children of the insolvent, the appellants before us, maintain that these properties are trust properties, while the Official Receiver and the creditors contend that the properties belonged to the insolvent with a charge for carrying out the trust mentioned in the will. If the properties are dedicated to a trust absolutely; it is clear that the Official Receiver cannot claim them; on the other hand, if the properties are only burdened with a trust, they would vest in the Official Receiver for the benefit of the creditors. The question for our decision is whether the properties covered by the will, Ex. A, are trust properties, or whether they are properties belonging to the insolvent with a charge for carrying out the trust mentioned in the will.

The answer to this question depends upon the correct construction of the will, Ex. A. It runs in the following terms: "On the site which is situate to the north of my shop and house and for which I have performed the manai muhur-

tham ceremony, my son Gopalakrishnan, shall with the stones, tiles and timber in my possession, construct a choultry spending an amount to the extent of Rs. 400 from and out of the outstandings set out in Schedule A, and instal in the aforesaid choultry the picture of Sri Gopalakrishnan, now kept and worshipped by me in the house as Kula Deivam (family deity). The monyam, the karnam and the tahsildar will be pleased to transfer the pattas for the nanja, punja, etc., properties of the value of Rs. 8,300 set out in Schedule A in the name of the said deity Gopalakrishnaswami after my death, and my son Gopalakrishnan and his heirs from generation to generation according to the rule of primogeniture, shall, without alienating the properties in any manner enjoy them paying sircar cist therefor, and conduct the charity mentioned in Schedule C and utilise the balance of the income for family purposes. If there be several heirs to my son, the seniors shall enjoy the aforesaid properties and after deducting the amount for charity and sircar cist, distribute the balance of the income amongst the heirs according to their shares, and shall never divide the properties. No one except the heirs shall be entitled to ask for an account of the said income. My daughter Janaki and her husband Rangaswami Naidu shall after my death enjoy with all rights the immoveable property of the value of Rs. 800 set out in Schedule B as stridhanam propery. The balance of Rs. 500 remaining after deducting Rs. 400 for the construction of the choultry out of Rs. 900, the amount of outstandings set out in Schedule A, shall be invested in the name of the said Gopalakrishnaswami and shall be augmented by my son and his heirs. If there be, by act of Providence, no income for the payment of sircar cist, the said sircar cist shall be paid from and out of the accretions of the aforesaid amount. In case my son or his heirs, owing to their negligence, fail to augment the income and pay the sircar cist, efforts shall be made for payment out of the amount so as to prevent the land being brought to sale by the sircar. My son Gopalakrishnan shall inherit all my other properties".
The nature of the charity mentioned in Schedule C will be referred to later.

The properties set out in the schedule consist of 61 acres. 85 cents of nunja lands, 2 acres 17 cents of punja lands, 3 acres 40 cents of maniam lands, 6 houses, about 12 tamarind trees, 189 cocoanut trees and 177 palm trees. Mr. Venkatachariar argues that the following features of the will conclusively show that the properties referred to in it are trust properties:

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Madhavan Nair, J.

(1). The son is enjoined to build a choultry, to instal the Kula Deivam in it for the purpose of family worship, and to conduct a charity, meeting the expenses from the income of the properties, (2) the pattas for the schedule properties are directed to be transferred in the name of the deity worshipped in the choultry, and (3) the last sentence in the will makes a special provision that his son Gopalakrishnan shall inherit all his other properties. It will have been noticed that the will contains an important provision regarding the enjoyment of the surplus income; it states that the testator's son and his heirs "from generation to generation according to the rule of primogeniture shall without alienating the properties in any manner enjoy them, paying sircar cist therefor, and conduct the charity mentioned in Schedule C and utilise the balance of the income for family purposes"; and provision is also made for the management and distribution of this balance of income among the heirs. This feature is pointed out by the respondent as showing that the real intention of the testator in making the gift was to make a provision for his family, though he called upon his son to conduct the charity and the worship out of the income of the properties. We have to construe all these clauses together and come to our conclusion as to whether the properties covered by the will are properties dedicated to trust absolutely, or whether they are only properties belonging to the insolvent burdened with a trust of carrying out the charity mentioned in the will.

Various cases have been brought to our notice with reference to the construction of the will. In all these cases, the decisions turned upon the construction of the terms of the document in each case. In *Mujib-un-nissa* v. *Abdur Rahim* (1), Lord Robertson said :

> "Their Lordships have, however, considered the question whether, assuming it to have been registered, the deed is, according to its terms, a valid deed of waqf. It will be so if the effect of the deed is to give the property in substance to the charitable uses. It will not be so if the effect is to give the property in substance to the testator's family".

This passage lays down the general test to be applied to cases of this description. Is the effect of the deed to give the properties in substance to charitable uses, or, is its effect to give the properties in substance to the testator's family? In *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (2), a Hindu gave all his properties by a will to his family idol with a direction that the properties should not be divided by his sons

1. (1900) L R 28 I A 15 : I L R 23 A 233, at p. 242 : 11 M L J 58 (P C).
2. (1859) 8 M I A 66.

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but that they should enjoy the surplus profits from generation to generation. Lord Turner, J., was of the opinion that:

"although the will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some distribution of property according as events might turn out."

In *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (3), a case of a gift by a lady of certain property for the support of the daily worship of an idol with a direction that the surplus, if any, should be utilised by the family, the Privy Council held that the property was only burdened with a trust and not absolutely dedicated, although there was a direction in the will that the heirs should have no powers of alienation over the properties bequeathed. In *Har Narayan* v. *Surja Kunwari* (4), the Privy Council had to construe a will which contained two directions: (1) that the moveable and immoveable property of the testator shall be considered to be the property of a certain idol and (2) that the surplus after defraying the expenses of the temple and the pay of the servants shall be used by the heirs to meet their own expenses. Their Lordships' view was that by this will the testator did not intend to give the property absolutely to the idol. In *Jadu Nath Singh* v. *Thakur Sita Ramji* (5) and *Ramanandan Chettiar* v. *Vava Levvai Marakayar* (6), two cases strongly relied on by the appellant, the Privy Council held, having reference to the terms of the deeds, that the dominating purpose and intention shown in the documents was to create a trust though there were provisions in the deed for the benefit of the heirs of the grantors.

Applying the principles of these decisions, we think that the learned Judge has construed the will in this case correctly. It is obvious from the nature of the charity that its maintenance will not cost any considerable sum. The details of the charity to be carried on are thus stated in Sch. C to the will: "For presenting food and performing worship every day for my family deity Sri Gopalakrishnan installed in the choultry mentioned in this will, a brahmin should be made to reside therein. He should be given 39 kalams of paddy every year and the said worship must be carried on. On the *Dwadasi* day of each of the two fortnights of the month not less than five brahmins should be given food. As there is a chatra maniam, a watershed must be maintained in the said choultry,

3. (1879) L R 6 I A 182 : I L R 5 C 438 (P C).
4. (1921) L R 48 I A 143 : I L R 43 A 291 (P C).
5. (1917) L R 44 I A 187 : I L R 39 A 553 (P C).
6. (1916) L R 44 I A 21 : I L R 40 M 116 : 32 M L J 101 (P C).

from 10 days before the Chitraparva to the end of the hot season and water must be served to all persons who come there. If the brahmin appointed for doing these things fails to conduct himself properly, my son Gopalakrishnan and his heirs should dismiss the said brahmin and appoint a substitute. The choultry should be retiled and repairs should be carried out every year." These are the various items on which expenditure had to be met from the income of the property already mentioned. It is obvious that the charity even if it is conducted on a lavish scale cannot consume any considerable portion of the income. We are satisfied that after meeting these expenses a very large amount of the income will be left intact for enjoyment by the family. Though the pattas of the properties in Sch. A have been transferred in the name of the deity, in our opinion, the effect of it is cut down by the provision relating to the enjoyment of the surplus by the members of the family. It was argued that the obvious intention of the testator inferrable from the last sentence of the will that "Gopalakrishnan shall inherit all my other properties" was to dedicate the properties in question to the deity, the son having been provided for in another way. But it has not been shown satisfactorily what properties have been given to Gopalakrishnan. Having regard to all the circumstances, we take the view that the dominating purpose and intention of the testator in executing the will was to provide for the members of his family. The maintenance and conduct of the charity was only of subsidiary importance. We are therefore of opinion that the properties covered by the will are not properties absolutely dedicated to a trust but are only properties burdened with a trust.

It is then argued that, even so, these properties cannot be sold by the Official Receiver as they are not properties of the insolvent, being free from liability to attachment in view of the decision in *Bishen Chand Basawat* v. *Nadir Hossein* (7). Reading that judgment carefully we are not prepared to accept this argument. We think the properties in that case were treated as absolute trust properties, which, as we have already pointed out, cannot be said about the properties we are dealing with in this case. We are therefore of opinion that the appellants cannot succeed in excluding these properties from vesting in the Official Receiver for the benefit of the creditors.

This appeal will therefore be dismissed with costs.

N. S. *Appeal dismissed.*

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7. (1887) L R 15 I A 1 ; I L R 15 C 329 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

A. L. S. P. P. L. Subramanian Chetty by his agent, Narayana Chetty ... *Petitioner* (Petitioner—Creditor)*

v.

Sivaswami Chetty and others ... *Respondents.*

Subramanian Chetty v. Sivaswami Chetty.

Civil Procedure Code—S 73—Rateable distribution—Right to—Joint family—Members of—Decrees, some against all, and others against one only of—Joint family property attached in execution of all decrees—Sale proceeds pertaining to share of one member—Rateable distribution out of, by person who had not obtained decree against him—Mode of distribution in such a case—Members of joint family—Decree personally against—Execution against entire joint family property in case of—Right of.

In a case in which two brothers constituted a joint Hindu family, and the property of the joint family was attached in execution of several decrees, some of which had been obtained against one of the brothers only, while the others had been obtained against both of them, *held* that the holders of the decrees against one of the brothers only were not entitled to rateable distribution from and out of the sale proceeds of the property pertaining to the share of the other.

Mode of distributing the proceeds in such a case pointed out.

In execution of a decree obtained personally against one only of the members of a joint Hindu family, it is not open to the decree-holder to contend that the decree was of such a nature that it could be executed against the entire joint family property.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge of Coimbatore, dated 1st December, 1925, in E. A. Nos. 602 and 700 of 1925 in E. P. R. No. 27 of 1924 in O. S. No. 16 of 1923.

M. Patanjali Sastri and *T. Krishnaswami Aiyar* for petitioner.

V. Rajagopala Aiyar and *N. Sivaramakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—*C. R. P. No. 39 of 1926* :—A preliminary objection is taken to this Civil Revision Petition that there is a right of suit reserved by statute for persons who feel aggrieved by erroneous orders passed under S. 73, Civil Procedure Code, and that therefore this Court should not interfere in revision. This Court has repeatedly held and it seems to me unnecessary to refer in particular to the decided cases on the question that in proper cases this Court not only may, but should, interfere. I am

*C. R. P. Nos. 39 & 40 of 1926. 18th August, 1927.

satisfied that the case before me is one in which this Court should interfere by way of revision, even though the parties might have under the law a right of finally adjusting their difference in a regular suit.

The petitioners are certain decree-holders who have obtained decrees against two brothers Kasturisami and Ramaswami. There were other decree-holders who obtained decrees only against one of the brothers, namely Ramaswami. It is now practically conceded that the properties, the sale proceeds of which are the subject-matter in question, had been attached in execution of all the decrees. There is no question about the properties having been the joint family properties of the two brothers. If therefore in execution of the decrees obtained against only one of them, Ramaswami, the property was attached, we must take it that only the right, title and interest of that particular judgment-debtor in the property was attached. At first I was labouring under the impression that there had been no such attachments and the question that was raised under S. 73 was one relating to rateable distribution only amongst creditors all of whom had not effected attachments in execution. No doubt, if the section which aplpied to the present case was S. 73, the difficulty would arise that the decree-holders against one of the brothers alone could not bring themselves under the terms of S. 73; but it is now clear that even those decree-holders had effected attachments before the sale at which these proceeds were realised. If so, such attaching decree-holders would be entitled to rateable distribution, though not under the terms of S. 73, clearly under the principle underlying S. 63, Civil Procedure Code. But at the same time it is perfectly clear that the decree-holders against one of the brothers alone are entitled to rateable distribution only in respect of his share in the property that was sold. For some reason or other which I fail to perceive or appreciate, the learned Jutge in the Court below seems to have ordered rateable distribution in the entire sale proceeds even to the decree-holders against one of the brothers alone, namely Ramaswami, and not merely against the sale proceeds representing the share of Ramaswami in the property sold. Undoubtedly the principle that should have been followed by the lower court was to take the sale proceeds and dividing it into two halves, distribute one half belonging to Kasturisami amongst all the decree-holders who had obtained decrees against both the brothers and the sale proceeds representing Ramaswami's share amongst all

the decree-holders who have obtained decree not only against both the brothers but also against Ramaswami alone proportionately; in other words the decree-holders who had obtained decrees against both the brothers will get porportionately not only in the half-share of Kasturiswami but also once over again in the share of Ramaswami's sale proceeds according to the total amount made up of the decree obtained against Ramaswami whether singly or jointly with his brother.

Mr. Sivaramakrishna Aiyar on behalf of the respondents attempted to contend that, though the decree against Ramaswami was personally against him, he would have under certain circumstances the right of proving in execution that the decree was of such a nature that it could be executed against the entire joint family property. Whatever might be said about the execution of a decree obtained against a father in a Hindu family, it is impossible, it seems to me, to contend that for the purpose of execution one is entitled to go behind the decree and show that it is not only a decree personally against the judgment-debtor but binding on other persons or on the properties of others. For the purpose of execution at any rate such a thing could not possibly be allowed to be done. I am therefore clearly of opinion that having elected to obtain merely a personal decree against Ramaswami it is not open to the decree-holders who have so elected now to require that such decrees should be treated as other than mere personal decrees against him. It therefore follows that the lower court was clearly wrong in ordering rateable distribution to the decree-holders against Ramaswami alone from and out of the sale-proceeds of the property pertaining to the share of Kasturiswami.

Before I conclude I might also refer to one other objection that was taken by the learned Vakil for the respondent and that was that the orders for rateable distribution were made some time in October, 1924, and that no Civil Revision Petition was filed against those orders and that therefore this Civil Revision Petition which is preferred against the orders made by the learned Subordinate Judge now is not sustainable. I was at first inclined to consider that there might be some substance in this objection, but it has turned out on an examination of the record that no orders really for rateable distribution fixing the proportion or determining the amount was passed by the Subordinate Judge, but that he merely as each decree-holder came on made an order that he was generally entitled to rateable distribution leaving it to a future

Subramanian Chetty v. Sivaswami Chetti.

date for the determination of the exact proportion and amount. The actual proportion and amount came to be decided and determined only by the order now under revision. I therefore hold that there is no substance in that objection.

In the result the order of the lower court is set aside and the matter will be referred back to the lower court for directing rateable distribution as indicated and if there had been payments made out in the meantime the lower court will of course take the necessary steps for the purpose of the necessary re-adjustments. The respondents will pay the petitioner's costs of this petition.

C. R. P. No. 40 *of* 1926 :—Same order as in C. R. P. No. 39 of 1926.

A. S. V. *Orders set aside and applications remitted.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD SINHA, LORD BLANESBURGH AND SIR JOHN WALLIS.

P. C.

Mussammat Ramanandi Kuer v. Mussammat Kalawati Kuer.

Mussammat Ramanandi Kuer ... *Appellant** (*Petitioner*)

v.

Mussammat Kalawati Kuer .. *Respondent* (*Opposite party*).

Probate and Administration Act, 1881, *S.* 50—*Revocation of probate—Grounds for—Citation on minor—Inference from non-registration of will—Construction of Indian Statutes founded on English Law—Probate in 'common form'* and *"solemn form'—Onus of proof as to whether a will was forged or genuine.*

Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded.

The Indian Succession Act of 1865 and the Probate and Administration Act of 1881 (both now consolidated by the Indian Succession Act of 1925), while to a large extent embodying the rules of the English law, yet depart in many particulars from those rules; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law but also differing much from that law, and purporting to be a self-contained system, (observations of Sir Arthur Wilson in *Kurrutulain Bahadur* v. *Nusbat-ud-Dowla Abbas Hossein Khan,* (1905) L R 32 I A 244 :I L R 33 Cal. 116 at p. 129 : 15 M L J 336 (P. C), relied on. In interpreting, therefore, the

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* P. C. Appeal No. 61 of 1926. 11th November, 1927.

P. C.

Mussammat Ramanandi Kuer v. Mussammat Kalawati Kuer.

statutory provisions of the Indian Legislature relating to testamentary cases, the Courts should proceed to examine the language of the Indian Statute uninfluenced by any consideration derived from the English law upon which it may be founded.

The introduction into Indian practice of the difference in English law between the grant of probate in 'common form' and in "solemn form', is to be deprecated.

Upon an application for probate of a will, the citation issued must be properly and effectively served, that is to say, so served as would give to the person whose interests are, or may be, adversely affected an opportunity either to oppose the grant of probate or to require the will to be proved in his presence.

Where a will of which probate is sought affects the interest of a minor, the prudent course is for the propounder to take steps to have the will proved *per testes* (*i.-e.*, in solemn form) in the presence of an independent guardian *ad litem* appointed for the minor.

Although registration of wills is not compulsory, non-registration may, *when coupled with other suspicious circumstances,* throw considerable doubt upon the genuineness of the document.

Probate of a will having been granted to the defendant, the plaintiff instituted proceedings under S. 50 of the Probate and Administration Act, 1881 (now re-enacted as S. 263 of the Succession Act, 1925), for revocation of the probate on two grounds, *viz.,* (1) that citations were not served on her before the grant of probate, and (2) that the will was a forgery. The issues raised in the case were : (1) Was no citation served upon the plaintiff? (2) Is the will propounded by the defendant, genuine or otherwise?

Held that, "If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand. If on the other hand the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground, *viz.,* that the will was forged, and the probate would stand or fall, according to the result".

In the present case, however, these two issues were not tried separately, and evidence was given by each party in support of their respective cases on both issues together.

Held, that, under the circumstances, neither party was prejudiced by the procedure adopted.

Their Lordships having, on the evidence, found for the plaintiff on the first issue, held, that in view of that finding, the onus of proof on the second issue as to whether the will was forged or genuine, was upon the defendant. "If citations were not properly and effectively served on the plaintiff, she is entitled to ask that probate which was obtained in her absence should be recalled and the executor or his representative called upon to prove the will in the present proceeding. In other words, the onus of proving that the will was genuine is in view of their Lordships' conclusion upon the first issue upon the defendant". *Held,* also, that the defendant had failed to discharge that onus.

Independently of any question of onus, their Lordships were of opinion, on the facts of this case, that the will was a fabricated document.

Judgment of the High Court reversed.

Appeal (No. 61 of 1926) from a judgment and decree of the High Court, Patna (Das and Adami, JJ.), dated the 16th March, 1925, which reversed a judgment and decree, dated the 18th January, 1923, of the District Judge of Patna.

The main question for determination on the present appeal was the genuineness or otherwise of a will alleged to have been executed by the appellant's father, Alak Prakash, on the 2nd February, 1913. The District Judge, who saw and heard the witnesses, found that it "is not the will of Alak Prakash but a fabricated document". The High Court took the opposite view.

The material facts are given in their Lordships' judgment.

De Gruyther, K. C., and *Dube* for appellant.

Lowndes, K. C., and *Wallach* for respondent.

Their Lordships' judgment was delivered by

Lord Sinha.

LORD SINHA :—Harangi Singh of Bihar, a small town in the District of Patna, had two sons (1) Alak Prakash and (2) Gyan Prakash. Alak Prakash was given in adoption to Angat Singh, a wealthy inhabitant of the same town. On Angat's death, Alak Prakash, still a minor, inherited from him properties of considerable value. Harangi with his family, including Gyan Prakash, thereupon came to live with Alak Prakash in Angat's house and managed the properties as Alak's guardian till the latter attained majority. But even after that Harangi and Gyan continued to live with Alak Prakash in his house.

On the 27th February, 1913, Alak Prakash died of phthisis at Patna, leaving a young widow, Thakurani Kuer, and an infant daughter, Ramanandi Kuer, the appellant. In May following, an anonymous petition, purporting to come from a well-wisher of the minor daughter of Alak Prakash was sent to the Collector of Patna, in which it was stated that Harangi was trying to secure the property for his second son.

That petition was sent for enquiry to the Sub-divisional Officer of Bihar, who, on the 1st June, 1913, called upon Harangi Singh "to state what he has to say to these allegations" in the petition, fixing the 16th June next for hearing. On that date a petition for two weeks' time was filed on the ground that Harangi Singh had gone on a pilgrimage to Jagannathji (Puri). Time was allowed till the 1st July, but on that day the enquiry was not further proceeded with, inasmuch as on the day previous, *viz.*, the 30th June, 1913, application had been made to the District Judge of Patna on behalf of Gyan

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Prakash Singh for probate of a will alleged to have been executed by Alak Prakash on the 2nd February, 1913. A general citation was affixed to the house of the deceased and another to the Court House in July. Affidavits by two out of the twelve attesting witnesses to the will were filed on the 30th July, 1913. Notices were issued to the widow and daughter of the testator and a report was made by the serving officer showing that service of the notices was acknowledged on behalf of Thakurani Kuer "for self and as guardian of Ramanandi Kuer" by one Awadh Bihari Singh, who described himself as the sister's son of Thakurani Kuer. Thereafter the order for grant of probate was made by the District Judge on the 23rd August, 1913, though questions having arisen as to the amount of probate duty payable, probate was not actually issued till the 26th March, 1914.

By the terms of this will the property was bequeathed to the son of Alak Prakash if any should be born to his wife Thakurani Kuer. In default of such male issue, one village was bequeathed to Thakurani Kuer for life, with remainder to the daughter Ramanandi and her issue with ultimate remainder in default of issue of Ramanandi to Gyan Prakash Singh. Another village was bequeathed in trust to Gyan Prakash Singh for vaguely defined charitable purposes, while the residue, forming the bulk of the property was bequeathed absolutely to Gyan Prakash.

After probate had been granted, the name of Thakurani Kuer was entered in the Collector's Registers in respect of the village bequeathed to her, while Gyan Prakash's name was similarly entered in respect of the remaining properties.

Harangi Singh died in 1916 and Gyan Prakash died on the 23rd November, 1918, leaving a minor widow, the respondent, Kalawati Kuer. So long as Harangi and Gyan Prakash lived, Thakurani, the widow, and Ramanandi, the daughter of Alak Prakash, lived under their care and protection in the house of Alak Prakash, exactly as they would have done if Alak Prakash had not been legally separated by adoption from his natural father and brother but continued to form with them members of a joint Hindu family.

On the death of Gyan Prakash, his widow, Kalawati Kuer (who was then a minor) was entitled to succeed him, but there was an agreement in writing on the 21st December, 1918, purporting to be executed by her and Thakurani Kuer whereby the estate was to be divided equally between them for life, with

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remainder to the daughter, Ramanandi. This agreement was probably not legally enforceable as Kalawati was a minor at the time and at any rate it was not acceptable to the father and other relations of Kalawati Kuer, who removed her from the influence of Thakurani Kuer in a manner which led to proceedings in the Criminal Courts. Disputes having thus arisen, proceedings for revocation of the probate were in contemplation when Thakurani died. On the 10th January, 1922, proceedings were actually instituted under S. 50 of Act V of 1881 on behalf of the minor Ramanandi Kuer for revocaiton of the probate, on two grounds principally, *viz.*, (1) that citations were not served either on her or on her mother, Thakurani, before the grant of probate and (2) that the will was a forgery. Objections were filed on behalf of Kalawati Kuer and issues were framed, of which two only are material for present purposes, *viz.* :

(1) Was no citation served upon the plaintiff, *i.e.*, Ramanandi Kuer? Had she no knowledge of the probate proceedings? Was she not properly represented in the probate proceedings?

(2) Is the will propounded by the opposite party, *i.e.*, Kalawati Kuer, the widow of Gyan Prakash, genuine or otherwise,

There has been some divergence of opinion in the Courts in India as regard the law and procedure governing cases for revocation of probate, due in part to the introduction into Indian practice of the difference in English law between the grant of probate in common form and probate in solemn form. It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded.

These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). As Sir A. Wilson observed, in delivering the judgment of this Board in the case of *Kurrutulain Bahadur* v. *Nusbat-ud-Dowla Abbas Hossein Khan* (1), these Acts while to a large extent embodying the rules of English law on the subject yet departed in many particulars from those rules; and in the pro-

1. (1905) L R 32 I A 244 : I L R 33 C 116 : 15 M L J 336 (P C).

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gress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law but also differing much from that law and purporting to be a self-contained system.

Now so far as the present case is concerned, the law is to be found in the Probate and Administration Act of 1881. S. 50 of that Act, so far as it is relevant, runs as follows:—

"The grant of probate .... may be revoked or annulled for just cause."

Explanation.—Just cause is :—

1st. That the proceedings to obtain the grant were defective in substance;

2nd. That the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case.

The relevant *Illustrations* to the section are :—

(*b*) The grant was made without citing parties who ought to have been cited.

(*c*) The Will of which probate was obtained was forged or revoked.

It is apparent that the plaintiff in this case set up both these grounds for revocation. The first issue as framed comes under Illustration (*b*) and the second issue under Illustration (*c*).

If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand.

If on the other hand the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground, *viz.*, that the will was forged, and the probate would stand or fall, according to the result.

It is obvious that the question of onus of proof is therefore of great importance in this case, and the District Judge as well as the High Court on appeal rightly lay stress as to the onus on each of these two issues, which might have been tried separately but were not so in fact, as evidence was given by each party in support of their respective cases on both

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issues together and not separately. Their Lordships agree with the Courts below that in the circumstances of this case neither party was prejudiced by the procedure adopted.

In considering the evidence on each of the two issues set out above, their Lordships bear in mind that the application for revocation was made eight years after the grant, and after the persons principally concerned in the original proceedings, *viz.*, Harangi Singh, Gyan Prakash, Thakurani Kuer and most of the witnesses to the alleged will were dead, and thah in accordance with the practice of the Indian Courts, some portion of the original records of the Court in the probate proceedings, including the affidavits of the two attesting witnesses, had been destroyed. These are all circumstances which would make it difficult for the defendant to prove her case.

On the other hand, certain other circumstances have to be considered in favour of the plaintiff. The will, if not absolutely inofficious, is adverse to the interests of the widow of the alleged testator and his only child. The former was an illiterate pardanashin lady, and the latter a child only two years old when the testator died. Both mother and child were living under the immediate protection of those who were propounding the will and, so far as appears from the evidence, there were no relations of the widow either in her husband's adoptive family or on her father's side who could protect their interests as against those of Harangi Singh and Gyan Prakash. It is true that Thakurani Kuer afterwards more or less acquiesced in the provisions of the will and in any case took no active steps against the will so long as Harangi and Gyan were alive; but having regard to all the circumstances, their Lordships are unable to draw any inference therefrom adverse to the plaintiff. And as against the difficulties in the defendant's way by reason of lapse of time, death of parties and witnesses and the destruction of records, it has to be remembered that much of it might have been avoided by prudent action on the part of the propounder, *e.g.*, by taking proper and necessary steps to have the will proved *per testes* in the presence of an independent guardian for the infant daughter. Their Lordships cannot endorse the view taken by Mr. Justice Das that, if a guardian *ad litem* had been assigned for her, Thakurani Kuer would have been so appointed, if all the circumstances were fully placed before the Court.

On the first issue, the conclusion of the District Judge may be best given in his own words:—

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"I cannot definitely find that the citation was not served upon her (Thakurani Kuer) but I do not consider that it has been proved that she was served or that she had any knowledge of the application for probate.'

As regards the daughter, he considered that

"if the special citation had been properly served upon Thakurani Kuer, Ramanandi would have been properly represented in those proceedings.'

On these findings, it is hardly correct to say, as Mr. Justice Das does, that the District Judge was satisfied that citation was properly served on Thakurani. It would be more accurate to say that though the District Judge was doubtful as to the actual service, he did not feel justified in definitely finding that she had not been served with the citation. In other words the District Judge found himself unable to come to any conclusion whether the notice was actually served upon her or not. The High Court considered that the failure on the part of the plaintiff to examine Awadh Behari was fatal to her case that no citation was served on Thakurani.

This renders it necessary to examine the position of Awadh Behari.

Mr. Justice Das was not prepared to hold that Awadh Behari was related either to Thakurani, as defendant's witnesses deposed, or to Harangi Singh, as plaintiff's witnesses said; but he concluded that Awadh Behari was more or less under the control of the plaintiff and should have been called by her as a witness on her behalf, chiefly for the reason that there was evidence of her own witnesses on two points (1) that at the dates when these proceedings were going on before the District Judge, Awadh Behari was actually in the service of Thakurani's sister as a cook and (2) that Awadh in Thakurani's lifetime signed many documents on her behalf.

Their Lordships think little importance can be attached to the first; nor to the second either, inasmuch as all the documents in question, execpt one, were signed at a time when Thakurani was still living as a dependent female member of the family of which the actual head was either Harangi or Gyan. The only document referred to in this connection and bearing date subsequent to the death of Gyan Prakash is Ex. P., which Awadh signed on behalf of both Thakurani and Kalawati and in which he described himself as the sister's son of Thakurani and as brother of Kalawati—both statements being equally incorrect.

It would rather appear from the evidence that Awadh Behari, though belonging to the same caste, occupied at the time of the alleged service the position of a servant in the family, and

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was presumably under the control of the male head thereof and subject to his direction.

Under these circumstances, their Lordships do not consider that the plaintiff could be reasonably required to call Awadh Behari as her witness for the purpose of contradicting his own previous statement.

In their Lordships' opinion, even if some kind of formality was gone through on the occasion when service of notice is said to have been effected, it was not such as would give to the person alleged to have been served an opportunity either to oppose the grant of probate or to require the will to be proved in her presence. In the peculiar circumstances of the case the service, if any, was of no greater effect in law than personal service on an infant of tender years.

The result is that the first issue must be decided in favour of the plaintiff.

With regard to the second issue as to whether the will was forged or genuine, the onus of proof depends upon the finding on the first issue. If citations were not served, *i.e.*, properly and effectively served, on Thakurani, the daughter is entitled to ask that probate which was obtained in her absence should be recalled and the executor or his representative called upon to prove the will in the present proceeding. In other words, the onus of proving that the will was genuine is in view of their Lordships' conclusion upon the first issue upon the defendant. It was candidly admitted by Counsel on the latter's behalf that *if* it was held that the onus was on her to prove the genuineness of the will, he could not contend that she had discharged that onus. He rested her case on the ground that the onus was on the plaintiff to prove that the will was forged, and that the plaintiff's evidence fell short of proving that the will was a forgery even if the circumstances connected with it might appear suspicious.

Their Lordships have, however, come to the conclusion that apart from any question of onus, the plaintiff has succeeded in proving that the will is not a genuine document for the reasons given below.

It is a circumstance which cannot be ignored that though care was taken to obtain as many as 14 attesting witnesses to the will, the simple precaution of getting the will registered at the local registration office was not adopted, even though registration of wills is not compulsory. Nor can it be considered anything but unusual and suspicious that no doctor or lawyer

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attested this will, specially in view of its provisions practically disinheriting the widow and the only daughter and the serious nature of the illness. Immediately after the testator's death, Harangi Singh purported to act as proprietor of the estate in paying Government Revenue and in granting receipts to tenants of the estate—a position wholly inconsistent with the provisions of the will. Then again the will was not produced or probate applied for until Harangi Singh had been called upon to explain his above-mentioned conduct. There is further the evidence of at least three witnesses, *viz.*, Khan Bahadur Saujid Mahomed Nur of Bihar and Babu Dhanukdhari Tewana, pleader of Bihar, that after the Collector directed enquiry to be made into the allegations made in the anonymous petition mentioned earlier in this judgment, Harangi Singh tried to get these witnesses to attest a will in favour of Gyan Prakash. The Distrist Judge, before whom these witnesses were examined, believed their evidence. Their Lordships do not agree with the High Court that their story is inherently improbable or that any suspicion attaches to it because they did not of their own motion inform the authorities of such contemplated forgery.

There is a total lack of evidence as regards the preparation of the draft and the engrossment of the will and the whole case for the will rests on the bare testimony of two out of the four attesting witnesses, whom the trial Judge did not believe. The two other attesting witnesses admitted their signatures on the will but alleged that their signatures were obtained by Harangi Singh by false representations as to the nature of the document, which they did not read at the time when they put their signatures upon it. The story related by these two latter may not be worthy of credit in all respects, and if it rested by itself would be of little use to the plaintiff's case. The District Judge also rightly refused to attach any importance to such evidence as was given as to the signature on the will not being that of Alak Prakash. It was certainly not expert evidence in any sense.

But the crucial point in the case is—where was Alak Prakash living on the 2nd February 1913 (the date of the alleged will)—at Patna, or in Bihar?

The plaintiff's case is that at the date of the alleged execution of the will, Alak Prakash was in Patna under the treatment of Dr. Jyotish Chandra Sen, L.M.S. (Calcutta), who practised at Patna, and also of Dr. Barat, a teacher of the Temple Medical School..

On the defendant's side, a number of witnesses were called to prove that Alak Prakash came to Patna on the 4th or 5th

February, that while there he was treated only by hakims and not by any doctors, and that he did not stay in that quarter of Patna which is called Jhauganj but in quite a different quarter called Badshahganj.

Both the District Judge and the High Court have disbelieved these witnesses for the defendant and found that Alak Prakash rented a house in Jhauganj-Patna, and was treated, not by hakims, but by Dr. Sen and Dr. Barat. The District Judge came to the conclusion upon the evidence that Alak Prakash was at Patna before the 2nd February and therefore that the story of his having executed the will at Bihar on that date was false.

The High Court, however, came to a different conclusion, and Mr. Justice Das says with regard to that part of the case:

"The critical question then is, did Alak Prakash come to Patna before the 2nd February, 1913? On this point the petitioner relies on the evidence of Dr. J. C. Sen and Dr. Barat. . . . Dr. Barat is an Assistant Surgeon and is a witness of undoubted position and respectability. His evidence is to the effect that he was called to see a patient of Dr. J. C. Sen at Jhauganj in a house on the bank of the Ganges. He visited the patient in consultation with Dr. J. C. Sen on four or five occasions spread over one or two weeks. He made a report on the urine of the patient on the 13th February, 1913 ...... I have no doubt whatever that Dr. Barat actually treated Alak Prakash and made a report on the urine of Alak Prakash. But the report is dated the 13th February 1913, and it is impossible on the evidence of Dr. Barat to say that Alak Prakash came to Patna before the 2nd February, 1913. I entirely accept the evidence of Dr. Barat, but in my opinion it does not touch the point which we have to consider in this case. I now come to the evidence of Dr. J. C. Sen."

Then, after quoting the evidence of Dr. Sen, the learned Judge proceeds:

"Giving his evidence on the 20th December, 1921, and without any documents to support his evidence, Dr. J. C. Sen was able to say that Alak Prakash came to Patna six weeks or two months before his death (in 1913). He admits that he has no documentary record of his treatment of Alak Prakash. It may be that Dr. Sen has a prodigious memory, but in my opinion it would be most unsafe to act on this evidence given nine years after the death of Alak Prakash in support of the case of the Petitioner that Alak Prakash was not residing in Bihar on the day on which he is alleged to have executed the will. In my opinion, it has not been established that Alak Prakash was not actually residing in Bihar on the 2nd February, 1913."

Apart from the fact that there is other evidence to prove that Alak Prakash resided in Patna for nearly two months before his death, it does not appear to their Lordships that in the case of Dr. Sen it was such a prodigious feat of memory as the learned Judge supposed. Alak Prakash was an old patient of Dr. Sen who had treated him three years before his death and had been

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to Bihar three or four times to treat him, the last time in December, 1912. When Alak Prakash came on the last occasion to Patna, he rented a house on the banks of the river which Dr. Sen had himself occupied before and which was under half a mile from the house in which Dr. Sen was himself residing. He visited him three or four times daily all the time he remained in Patna. He said that he treated him in Patna for two or three weaks before calling in any consultant and that Dr. Barat came in as consultant during the last two or three weeks of the illness, and that Colonel Sunder also came three or four times, *i.e.*, after the first two or three weeks of Alak Prakash's stay in Patna.

The District Judge who saw and heard Dr. Sen in the witness box believed his evidence on this material point, and their Lordships consider it impossible to reject it without ascribing to a member of an honourable profession deliberate falsehood, for which no ground has been made out.

Taking the whole of the evidence and considering the position of both the doctors concerned, their Lordships agree with the finding of the trial Court that Alak Prakash was in Patna and not in Bihar on the 2nd February, 1913, and that the will bearing date the 2nd February, 1913, of which probate was granted on the 25th March, 1914, is not the will of Alak Prakash Singh and is a fabricated document.

Their Lordships will therefore humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the District Judge restored, with costs of the appeal to the High Court and of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *W. W. Box & Co.*

K. J. R. *Appeal allowed.*

Reporter's Note : Proceedings for the revocation of a probate are "miscellaneous proceedings" (cf. S. 141, Civil Procedure Code, 1908), and although the procedure is generally regulated by the Civil Procedure Code (see S. 55, of the Probate and Administration Act, 1881, now S. 268 of the Succession Act, 1925), there is no "suit" and, consequently no 'plaintiff' or 'defendant'. According to the practice of the Indian Courts, the party applying for revocation of probate is called "petitioner" and the executor or person opposing the petition is generally styled "opposite party". In the above judgment, however, their Lordships throughout refer to the parties as 'plaintiff' and "defendant" respectively. In this connection, reference may usefully be made to S. 88 of the Probate and Administration Act (now S. 295 of the Succession Act, 1925), as regards procedure in contentious cases. K. J. R.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA AND SIR LANCELOT SANDERSON.

Sri Rani Chattra Kumari Devi ... *Appellant** (*Plaintiff*)

v.

W. W. Broucke ... *Respondent* (*Defendant*).

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Bengal Tenancy Act, 1885, *S.* 74—*Abwabs—Actual rent—Malguzari meaning of.*

S. 74 of the Bengal Tenancy Act, 1885, enacts that "all impositions upon tenants under the denomination of abwab, mathat or other like appellations in addition to the actual rent shall be illegal, and all stipulations and reservations for the payment of such shall be void". The object of the whole series of enactments from the Regulations of 1791 to the Act of 1885 was to prevent exactions from tenants beyond the rent specified in their patta, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom.

It must depend on the circumstances of each particular case whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The words *actual rent* in the above section of the Bengal Tenancy Act cannot be taken to mean either a *fair and equitable rent* or rent at *customary* or *pergana* rates.

The word 'Malguzari' cannot be rendered as *rent,* much less as *actual rent.* It ordinarily means *revenue.*

Quaere :—Whether the words *actual rent* in S. 74, Bengal Tenancy Act, 1885, are equivalent to the *assul jama* of the old Regulations.

"Long use or custom cannot validate *abwabs* as an addition to the rent": *Tilukdari Singh and others* v. *Chulhan Mahton,* [(1889) L. R. 16 I. A. 152 : I. L. R. 17 Cal. 131 (P. C.)], referred to.

Judgment of the High Court reversed.

Appeal (No. 2 of 1926) from a judgment and decree of the High Court, Patna (Dawson Miller, C. J., and Foster, J.), dated the 5th January, 1925, modifying a decree of the Subordinate Judge of Muzafferpore, dated the 20th July, 1920.

The appellant as the executrix of her late husband, Raja Mohan Bikram Singh, the former proprietor of the Ramnagar Estate, sued the respondent for possession of thirty-six villages which her husband had let to him, with arrears of rent, compensation for use and occupation, and damages for breaches of covenants contained in the lease.

The main question in the appeal was whether any, and what, portion of the money which the respondent had agreed

*P. C. Appeal No. 2 of 1926. 18th October, 1927.

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by the lease to pay to the appellant's husband as consideration for the lease was irrecoverable as being an *abwab* imposed in addition to the actual rent within the meaning of the Bengal Tenancy Act (VIII of 1885).

The Trial Judge gave judgment and passed a decree in favour of the appellant. He held that the question whether the part of the rent attributed to the disputed items was in the nature of *abwabs* depended primarily on the construction of the lease, and decided that the lease clearly showed that the whole of the payments reserved were rent.

From that decree the respondent appealed to the High Court of Judicature at Patna. The learned Judges of the High Court differed from the Trial Judge on the construction of the lease. The principal judgment was delivered by the learned Chief Justice, who summed up his conclusion in the following words :—

"Whatever difficulty may have arisen in the interpretation of the Regulations, the law as it now stands under S. 74 of the Bengal Tenancy Act appears to me to present no ambiguity. All impositions upon the tenants under the denomination of *Abwab, Mathat,* or other like appellations in addition to the actual rent, are illegal, and all stipulations and reservations for the payment of such are void. They cannot legally be exacted, nor can the tenant legally bind himself by contract to pay them. ..... In my opinion, it is clear beyond any reasonable doubt that *Abwabs,* such as those mentioned in the lease, had been collected from the tenants long before the lease was executed, and were regarded as having the sanction of custom. I am also of opinion that on the proper construction of the lease, the defendant undertook to pay them under the different denominations of *Abwabs,* as set out in the Schedule, and as indicated in the body of the lease, and not as part of the rent which is described as *Malguzari*..... I hold that the only items recoverable under this lease, apart from the produce rent, are the first two named in the Schedule, namely, rent and road-cess, and that the decree should be varied by disallowing the other items."

The material portion of the lease in question is set out in the judgment of the High Court [see *W. W. Broucke* v. *Sri Panch Rani Chattar Kumari Devi* (1)].

In the course of the argument before their Lordships, most of the cases referred to in the judgments of the High Court [and reported in *W. W. Broucke* v. *Sri Panch Rani Chattar Kumari Devi* (1)] were cited and commented on. Learned counsel also referred to the "Fifth Report on East India Affairs, 1812", and to the definition of *Abwab* therein given, namely,

1. (1925) I L R 4 P. 404.

"Items of taxation, cesses, imposts, taxes. This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *assul*, or original standard rent, in the nature of additions thereto".

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Lowndes, K. C., and *Raikes* for appellant.

De Gruyther, K. C., and *Dube* for respondent.

Their Lordships' judgment was delivered by

LORD SINHA :—The question in this case turns on the construction of a lease, dated the 22nd May, 1911, of 36 villages of the Ramnagar Raj in the province of Behar and Orissa, granted by the Rajah to a Mr. Broucke.

The material part of the lease is stated in the judgment of the Chief Justice of Patna as follows:——

"I have let out 16 annas of the following 36 villages as per boundaries given below.... at a consolidated annual Jama of Rs. 15,581-5-0, being the Malguzari, road and embankment cesses, dues of priests (Mahal Uprohiti) and expenses for obtaining acquittance receipts (Farag Karach), etc., in addition to 515 maunds of paddy specified below payable annually at a uniform rate under a Thika Patta, the term whereof is given below and on receipt of a Kabuliyat to Mr. W. J. Broucke."

At the end of the document is a schedule giving a list of the 36 mauzas and stating in the case of each mauza the total annual "jama" and details of how it is made up. One instance will suffice. The first mauza is Thath Mitia. The particulars thereunder show first of all that the term is for 15 years from 1319 to 1333 F. Then follows a list of payments in respect of that mauza as follows :—

		Rs.	as.	p.
Malguzari	...	673	2	0
Road cess	...	40	8	0
Embankment cess	...	10	2	0
Costs of acquittance	...	24	4	0
Dasahara and Chait Nawmi Farmaish	...	12	0	0
Tika, Bheti, Guru Bheti	...	5	0	0
Batchhapi, Jangla-isim-navisi	...	7	0	0
Katiari	...	4	0	0
Dewani Dastur	...	24	14	0
Mahal Uprohiti	...	5	0	0
Total	...	805	14	0

Paddy 35 maunds.

The total of Rs. 805-14-0 thus arrived at is then treated as the *Jama Eksala* (annual rent), and is divided into four

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kists of Rs. 201-7-6 payable in Asin, Pous, Chait and Jeyth.

The word "*malguzari*," translated as *rent* in the High Court record, ordinarily means *revenue*, and is so rendered in Wilson's Glossary.

The Chief Justice of Patna was of opinion that the last eight items of the list above had been collected as *abwabs* from the raiyats long before the lease was executed and were regarded as having the sanction of custom, and he held (Foster, J., concurring) that on a proper construction of the lease Broucke undertook to pay them as *abwabs* under the different denominations as set out in the said schedule and as indicated in the body of the lease, and not as part of the *rent*, which the Chief Justice took to be the meaning of "malguzari" (the first item). In that view the High Court held that under S. 74 of the Bengal Tenancy Act, the lessor was not entitled to recover the amounts covered by the items 3 to 10 of the list, as being *abwabs* in addition to the rent payable under the lease.

S. 74 of the Bengal Tenancy Act, 1885, enacts that "all *impositions* upon *tenants* under the denomination of abwab, mathat or other like appellations in addition to the *actual rent* shall be illegal, and all stipulations and reservations for the payment of such shall be void."

That section has a long legislative history behind it from 1791 to 1885, which was referred to at the Bar, but to which it is unnecessary to refer further than to state that the object of the whole series of enactments from the Regulations of 1791 to Act VIII of 1885 was to prevent exactions from tenants beyond the rent specified in their patta, when there was one, and if there was no written engagement, beyond what was the rent actually payable whether by verbal agreement or by virtue of custom.

There being a written engagement or lease in this case (the patta and kabuliat) the only question is whether the *actual* rent payable by Broucke as tenant to the Rajah as his landlord is what that lease calls the "consolidated *annual* jama" of Rs. 15,581-5-0 *plus* 515 maunds of paddy, as the Subordinate Judge held, or only a portion thereof, as the High Court held.

Their Lordships are unable to endorse the view taken by the High Court.

Malguzari, which is the first of the items composing the total yearly jama for each village, cannot be rendered as *rent*,

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much less as *actual rent*; nor is there any evidence to show that the amount of the malguzari was the *actual rent*, as distinguished from *abwabs*, paid by the cultivating raiyats of the village. The only distinction apparent on the face of the lease is between *cash rent* and *produce rent*. So far as the former is concerned, it is impossible to take the first item as being actual rent and the rest as abwabs when they are all included in the total, which is expressly stated to be the annual rental payable in four equal kists, or instalments, specified in figures. It is also to be noticed that the execution-clause of the patta, signed by the Rajah, is as follows :—

"Executed this Jika-Patta for a term of 15 years in respect of 34 villages and of 17 years in respect of 2 villages in all 36 villages at an annual jama of Rs. 15,581-5-0 and 515 maunds of fine paddy to be realised from year to year."

Similarly the execution-clause of the kabuliat signed by Broucke is as follows :—

"Kabuliat given by me on jama rupees fifteen thousand and five hundred and eighty-one and five annas only."

Their Lordships agree with the Subordinate Judge that Broucke was bound under his engagement to pay the rent mentioned therein as the annual rental, and cannot evade this liability because the raiyats may not or do not pay him what they used to pay to the Rajah. The question as to what each raiyat was or is liable to pay as his *rent* is not before their Lordships, and they do not express any opinion upon it.

A large number of cases decided by the Calcutta and Patna High Courts were referred to in the judgments and cited at the Bar. Their Lordships do not consider it necessary to refer to them beyond expressing their agreement in the view that in each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The case of *Tiluckdari Singh and others* v. *Chulhan Mahton* (2) decided by this Board and reported in L. R. 16 I. A. 152, was also referred to. In that case there was an old tenancy without any written contract. But the money claimed was described in the plaint itself as old usual abwabs, and the Zemindar's books of account produced in the case showed that on the face of those documents the payments made by the tenant were distinguished as (1) rent and (2) abwabs, *i. e.*, so much for rent, and so much for abwabs. The latter were claimed on the ground that they were payable by custom and

2. (1889) L R 16 I A 152 : I L R 17 C 131 (P C).

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had been, in fact, paid for a long time without objection. It was held that long use or custom could not validate *abwabs* as an addition to the rent.

A somewhat novel argument was advanced on behalf of the respondent, *viz.*, that the words *actual rent* in S. 74 of the Bengal Tenancy Act were equivalent to the *assul jama* of the old Regulations, and that any stipulation to pay a rent which, in fact, exceeded what was the *assul jama* would be illegal to the extent of such excess. This would raise an issue of fact as to what was the *assul jama* of the 36 villages—the subject-matter of the lease. No such issue was raised in the Courts of India, and, indeed, in no reported case does any such question appear ever to have been raised.

Their Lordships would moreover point out that the words *actual rent* in S. 74 cannot be taken to mean either a *fair and equitable rent* or rent at *customary* or *pergana* rates.

In their Lordships' opinion Broucke's *actual* rent under his lease is the sum of Rs. 15,581-5-0 in cash and 515 maunds of fine paddy, as found by the first Court, and their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be reversed and the judgment of the Subordinate Judge restored, with costs of this appeal and of both Courts in India.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondent: *W. W. Box & Co.*

K. J. R. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

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Messrs. Sheikh Abdul Kadir Marakayar & Co. ... *Assessees.*

Income-tax Act (XI of 1922), S. 34—Re-assessment—Validity—Condition precedent to—Notice of intention to re-assess not validly served on party within the year—Initiation of re-assessment proceedings by Commissioner by notice served after lapse of the year in case of—Legality—S. 33—Effect—Revision by Commissioner under S. 33—Limitation applicable to—Re-assessment Proceedings—Initiation of—Power of—Assistant Commission-

*Referred Case No. 20 of 1926. 5th May, 1927.

er and Commissioner, if have—S. 28—Levy of penalty under—Power of—Condition precedent to—Commissioner's power to levy penalty—Re-assessment proceedings illegally started by him—Levy of Penalty in-Legality.

The condition precedent to a valid re-assessment under S. 34 of the Income-tax Act of 1922 is the service within one year of a proper notice on the assessee giving notice of the intention on the part of the Income-tax Officer to re-assess. That condition should be rigidly observed before the power to re-assess is purported to be exercised.

It is the Income-tax Officer alone that can initiate re-assessment proceedings. Neither the Assistant Commissioner nor the Commissioner has power to initiate such proceedings.

The Commissioner cannot, on finding that the notice of the intention to re-assess required by S. 34 was not properly served on the assessee within the year, serve another notice after the lapse of the year and seek to re-assess him. Though no limitation of time is prescribed for interference by way of revision under S. 33 of the Act, the Court would almost always incline in favour of the view that such exercise of power should be within a reasonable time of the proceeding sought to be revised, reasonable time being computed by the Court having regard to all other provisions of the Act and to the special facts of each case.

The Commissioner exercising the powers of revision under S. 33 cannot do what the Income-tax Officer could not possibly have done. For purposes of initiating proceedings of re-assessment, S. 33 of the Act is subject to the provisions of S. 34, and the Commissioner has no right of initiating or independently starting re-assessment proceedings.

Re-assessment proceedings under S. 34 should have been started before the power to levy penalty under S. 28 is exercised. Where, therefore, the Commissioner levied penalty only purporting to exercise powers of re-assessment, which he had not, *held* that he had no power to levy penalty under S. 28.

Proceedings by way of re-assessment under S. 34 are not open to the Commissioner. But so far as any assessment made by the subordinate officer is concerned, there is nothing in S 33 which prevents the Commissioner from enhancing the assessment made on the materials available.

The power to levy a penalty under S. 28 cannot be exercised by the Commissioner, as in re-assessment proceedings, if proceedings by way of re-assessment have not been properly commenced. Bht if on the materials with reference to any original assessment itself it should on revision appear to the Commissioner that there has been any concealment within the meaning of S. 28, then S. 33 would undoubtedly empower him to levy penalty.

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Case stated under S. 66 (1) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in his letter No. 2015 of 1926, dated 11th November, 1926.

The facts of the case are as follows:—For the assessment of the year 1923-24 based on the accounts of the period 1st April, 1922, to 31st March, 1923, Messrs. Sheik Abdul Kadir

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Marakayar and Co., were required by the Income-tax Officer (Revenue Divisional Officer), Palghat, to make a return of their income under S. 22 (2) of the Income-tax Act, 1922.

The assessees returned their income at Rs. 4,860 from business. In response to a notice under S. 23 (2) of the Act, they produced their accounts through their clerk, Mr. Erachan Nair, who usually represented them in Income-tax proceedings. The accounts were examined by an Accountant of the Divisional Officer, who stated in his notes that the assessees were trading in buffalo hides, bull hides, and goat hides and that their gross income from business according to the accounts amounted to Rs. 17,705. The assessee's clerk who was examined on oath by the Income-tax Officer accepted this figure and claimed to deduct from it expenditure amounting to Rs. 7,667. The Income-tax Officer disallowed certain inadmissible expenses such as food expenses, income-tax and charity and fixed the taxable income at Rs. 12,058. He accordingly assessed the petitioners on 18th December, 1923, under S. 23 (3) of the Act, and levied a tax of Rs. 565-4-0. In the course of the assessment for the next year 1924-25, the Income-tax Officer who himself examined the accounts observed that in addition to the sources of income disclosed on the assessment of the year 1923-24 the petitioners had other sources such as trade in salted buffalo, hides, salted sheep skins, grease, horns, and ground rent and also derived income from commission. He foud that the petitioners had derived an income of Rs. 18,943 from these sources as particularised below during the year of account 1922-23 and that this income had escaped assessment in the year 1923-24.

	Rs	As.	Ps.
Profit on salted buffalo hides,	15,479	14	10
Profit on salted sheep skins	338	3	9
Profit on grease	186	1	10
Profit on horns	389	12	3
Commission	2161	9	9
Charity	159	15	8
Ground rent	227	12	0
Total.	18,943	0	0

The petitioners had been assessed on Rs. 12,058 while their real income was Rs. 18,943 more or Rs. 31,001. The Income-tax Officer therefore decided to take action under

S. 34 of the Income-tax Act, and issued a notice to the assessees calling on them to make a fresh return of their income during the year of account 1922-23. This notice was served on Erachan Nair, who was still representing the firm in the assessment of 1924-25. The assessees did not respond to this notice. The Income-tax Officer made the assessment, under Ss. 23 (4) and 34 of the Income-tax Act, on an income of Rs. 31,001 and levied additional tax amounting to Rs. 1,856-11-0 in respect of the assessment year 1923-24. The notice of demand was served on the assessees on 13th March, 1925. They then filed a petition before the Income-tax Officer under S. 27 of the Act, and alleged that the notice, required to be given under S. 34 of the Income-tax Act, had not been served on them. When it was pointed out to them that a notice was issued and was served on their representative, Erachan Nair, they maintained that their representative did not bring it to their notice and that as Erachan Nair was not an authorised agent the notice served on him did not amount to a valid service. Erachan Nair was then examined by the Income-tax Officer. He admitted having signed an acknowledgment but explained that he was under the impression that the signature obtained from him was in token of his having prepared statements from accounts for the assessment of the year 1924-25. The signature obtained from the representative was in a printed acknowledgment slip which recited "received Income-tax notice form 10 and 11 (S. 34)". The representative knew English and his explanation was obviously false. The clerk of the Income-tax Officer who handed over the notice under S. 34, was examined and he deposed that he personally gave the notice to Erachan Nair. On the evidence recorded the Income-tax Officer found that the notice was served on Erachan Nair, that he was the person who was sent to represent the assessees in their Income-tax proceedings and posed as their agent, service on him was valid service and that the petitioners were not prevented by sufficient cause from making the return. He accordingly dismissed the application under S. 27. A copy of his order is appended—Ex. A. Against this order the petitioners filed an appeal to the Assistant Commissioner under S. 30 of the Income-tax Act, and contended that the service of the notice on Erachan Nair was not valid service as he was not their authorised agent. The Assistant Commissioner held that, though Erachan Nair was sent by the assessees to represent them in their Income-tax proceedings and the assessees had used him as their agent, he

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was not formally authorised by them to act on their behalf and that the notice served on him was not valid. He therefore cancelled the assessment made by the Income-tax Officer. A copy of his order is appended—Exhibit B. My predecessor (Mr. Strathie) who perused the records of this case was of opinion that, by dishonestly concealing their income in their return and suppressing the evidence of the accounts when called for, the petitioners had evaded a large amount of tax in the first assessment and that the supplemental assessment started under S. 34 of the Act had been cancelled by the Assisstant Commissioner on a technical point. He therefore proposed to restore the assessment made by the Income-tax Officer in the exercise of the powers vested in him under S. 33 of the Income-tax Act. He issued a notice to the petitioners on 31st July, 1925, and called on them to show cause why he should not enhance the original assessment and also levy a penalty under S. 28 of the Income-tax Act. They responded to this notice through a vakil, and contended that S. 33 did not enable the Commissioner to take action and enhance the assessment after the expiry of one year from the end of the year for which the assessment was made. They also asked the Commissioner to refer this point for the decision of the High Court. They did not produce the accounts of the year 1922-23 on the plea that they had been destroyed by fire. Nor did they examine Erachan Nair to prove their case that he did not communicate to them the notice issued under S. 34 of the Income-tax Act. Mr. Strathie was of opinion that S. 33 did not impose any time limit on his powers to proceed under that section and that there was no need to refer any question of law to the High Court. He therefore enhanced the assessable income of the petitioners from Rs. 12,058 to Rs. 31,001, *i.e.*, he restored the assessment made by the Income-tax Officer under S. 34 of the Act. At the same time he levied a penalty of Rs. 1,000 under S. 28 of the Act, as the assessees had concealed particulars of their income in their original return. Copies of his orders under Ss. 33 and 28 of the Income-tax Act are appended—Exhibits C and D.

On the petitioners' application under S. 45 of the Specific Relief Act, the High Court, has directed me to refer the following points for its decision.

(*a*) Whether a Commissioner is empowered by way of review or revision to impose the assessment and penalty levied by him by his order, dated 8th September, 1925, against the firm of Sheik Abdul Kadir Marakayar and Company.

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(b) Whether in the circumstances of this case the powers of review under S. 33 of the Income-tax Act, 1922, could be exercised by the Commissioner with a view to re-open and enhance an assessment made under the old Income-tax Act of 1918.

(c) Whether Ss. 33 and 28 of the Income-tax Act, 1922, are not controlled by the provisions of S. 34 of the same Act.

(d) Whether the Commissioner in exercise of the powers under S. 33 can re-open and enhance an essessment more than one year old and levy penalty under S. 28 in respect of such an assessment.

I may be allowed to point out that the second question does not arise in this case as the assessment originally made by the Income-tax Officer (Revenue Divisional Officer), Palghat, was under the Income-tax Act, 1922, and not under the Act of 1918, as stated. The other questions really reduce themselves to the single question whether the words "subject to the provisions of this Act" limit the powers of the Commissioner under S. 33 to cases not older than the year previous to that in which the revision is undertaken.

Before giving my opinion on the above question I would request their Lordships to view the case from the following aspect. The notice required under S. 34 was issued in the one year's limit. An assessment was made and there was a petition made under S. 27. An appeal was preferred to the Assistant Commissioner against the order dismissing the petition under S. 27. In the course of the hearing of the appeal, it was held that there was a technical irregularity in the service of the notice. That being so, it is, I submit, possible to regard the Commissioner's proceedngs as a continuation of those of the Income-tax Officer and to hold that action under S. 34 was taken within the period prescribed therein and that the Commissioner was merely rectifying a technical irregularity. If this view is correct the above question of law does not arise at all.

On the question raised I am of opinion that S. 33 does not limit the period in which the Commissioner can take action. The legislature while it has laid down a limit of time within which subordinate officers may take action under Ss. 34 and 35 has specifically refrained from prescribing any such limit in the case of the Commissioner. The words "subject to the provisions of this Act" seem merely to mean that the

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Commissioner in revising a case is bound by the provisions of the Act regarding the computation of income, admissible deductions, procedure *etc.*, I do not consider that these words can bear any wider interpretation. It would have been very easy for the Legislature to prescribe a limit of time had it wished to do so. I submit that the Act should be literally interpretted and that in the absence of a time limit imposed *totidem verbis*. The Court should not be swayed by any suggestion that the exercise of powers unlimited in point of time is contrary to natural justice. It appears to me moreover that there is nothing unreasonable in these wide powers being given to the Commissioner. In India the power of review given to the lower officers is rigidly restricted to one year, whereas in England, any Officer of the Revenue staff may revise assessments within six years. The power of revision being restricted in India to the Commissioner, it is but natural that that power should be unlimited with regard to time especially as in India there is far more scope for incorrect assessments than there is in England. It has to be remembered that the Commissioner is a busy officer and it is physically impossible for him to revise more than a very limited number of cases. Action was only taken in the present case, because the proceedings before the Assistant Commissioner had just terminated and because the Commissioner was of opinion that the assessees had escaped proper assessment. The action of the Commissioner is subject to the control of the Central Board of Revenue. There is therefore no danger whatever of the Commissioner's powers being abused. On the other hand it appears to me eminently reasonable that the Commissioner, who is the supreme executive authority referred to in the Act, should have unlimited powers to rectify at his discretion mistakes which come to his notice, even though more than a year may have elapsed since the year to which the assessments relate. The imposition of a time limit would of course operate both ways, and might compel a Commissioner to withhold relief where justice requires that it should be given. As the grounds for holding that the legislature have by implication limited the Commissioner's powers to one year are very slight, it may be permissible to assume that those responsible for the passing of the Act, undoubtedly, did not intend that any limit should be imposed. With reference to the wording of the first question put to me I wish to make it clear that I do not claim power for the Commissioner to initiate

proceedings otherwise than under S. 34 for the assessment of income in regard to which no previous proceedings have been taken by his subordinates. It is not usual for a Commissioner to initiate assessment proceeedings at all nor has he as Commissioner the power to do so and a Commissioner who exercised the powers of an Income-tax Officer by starting assessment proceedings or who directed any officer subordinate to him to start any such proceedings absolutely *de novo* would no doubt be controlled by the time limit prescribed in S. 34. But in this case the action taken by the Commissioner was not taken in exercise of the powers of the Income-tax Officer but in exercise of the powers explicitly conferred on the Commissioner by S. 33. There was no question of starting assessment proceedings *de novo*. The Commissioner's order was passed by way of revision or review of the proceedings previously taken by the Income-tax Officer and the Assistant Commissioner. It was not an assessment proceeding and cannot properly be described as such merely because it re-instated the assessment imposed in due time by the Income-tax Officer under S. 34. In my opinion it does not fall under S. 34, nor has S. 34 any application to it.

Regarding the legality of the penalty imposed under S. 28, I am of opinion that this depends entirely on whether the Commissioner had power to review the case under S. 33. The penalty was imposed in the course of the proceedings under S. 33 and was lawful if those proceedings were lawful.

M. Patanjali Sastri for the referring officer.

Vere Mocket for *Basheer Ahmad Sayeed* for assessees.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—By order of this Court, dated the 9th day of November, 1925, the Commissioner of Income-tax has referred for the decision of this Court the following questions:

(*a*) Whether a Commissioner is empowered by way of review or revision to impose the assessment and penalty levied by him by his order, dated 8th September, 1925, against the firm of Sheikh Abdul Khader Marakayar and Company;

(*b*) Whether in the circumstances of this case the powers of review under S. 33 of the Income-tax Act, 1922, could be exercised by the Commissioner with a view to re-open and enhance an assessment made under the old Income-tax Act of 1918;

(*c*) Whether Ss. 33 and 28 of the Income-tax Act, 1922, are not controlled by the provisions of S. 34 of the same Act;

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(*d*) Whether the Commissioner in exercise of the powers under S. 33 can re-open and enhance an assessment more than one year old and levy penalty under S. 28 in respect of such an assessment.

All the facts necessary for the reference have been set out in the letter of reference to this Court and for purposes of the answer the facts may be briefly set out.

A firm called Messrs. Sheikh Abdul Khader Marakayar and Company who were liable to pay income-tax for the assessment year 1923-24 based on the accounts for the year 1922-23 escaped income-tax on a portion of their income by reason of certain sources of their income being withheld. Under the provisions of S. 34 of the Income-tax Act XI of 1922 the Income-tax Officer was entitled to proceed before the end of year 1924-25 to re-assess such income. It is admitted that action was taken by the Income-tax Officer under S. 34 of the Act and notice also issued before the 31st of March, 1925. As the assessees did not make any response to the notice, the Income-tax Officer proceeded to re-assess and as the result thereof an additional tax amounting to Rs. 1,856-11-0 was imposed on the assessees. The notice of demand was served on them on the 13th of March, 1925. The assessees thereupon filed before the Income-tax Officer a petition under S. 27 of the Act on the ground that the original notice of re-assessment had not been properly served on them, but the Income-tax Officer dismissed that petition holding that there was proper service.

The petitioner thereupon filed an appeal to the Assistant Commissioner and he set aside the order of re-assessment holding that there has been no valid service of the notice of re-assessment. What is required to be done under S. 34 of the Act to entitle the Income-tax Officer to re-start proceedings and re-assess the parties is the service of a notice of such assessment according to the prescribed form.

Thus, after the order of the Assistant Commissioner in appeal setting aside the order of re-assessment made by the Income-tax Officer, there was an end of all the proceedings lawfully started for re-assessment. It was thereupon that the Commissioner of Income-tax purported to take proceedings under S. 33 of the Act. That section enables the Commissioner of his own motion to call for the records of any proceeding under the Act and after any enquiry to pass subject to the provisions of the Act such orders as he thinks fit. Though this is called "the power of review" in the marginal note to the

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section, it is clear that the real jurisdiction given under this section is not by way of review but by way of what is generally known as revision or superintendence. Proceeding under that section in effect what the Commissioner said and did was really this:

"The Income-tax Officer started proceedings under S. 34 and re-assessed the parties, but the order of re-assessment was set aside by the Assistant Commissioner on appeal on the ground that there had been no proper service of notice. I will assume that there was no proper service of notice, but as the Income-tax Officer really commenced proceedings, I shall under S. 33 take up that proceeding at the stage at which it was left and proceed to re-assess the parties by virtue of the powers vested in me of revision under S. 33 of the Act".

On these facts, the first question (Question A) which is the general question, has to be answered only on the result of the answers to the other questions.

Question (*b*) as pointed out by the Commissioner does not arise, because it appears to have been raised on a misapprehension that the proceedings sought to be reviewed were proceedings that had been taken not under the present Act, namely the Act of 1922, but under the old Act of 1918. But it has been pointed out that the proceedings were taken only under the new Act. The question therefore does not arise or require to be answered.

Then as regards Question (*c*) which is as follows:

"Whether Ss. 33 and 28 of the Income-tax Act, 1922, are not controlled by the provisions of S. 34 of the same Act".

Taking S. 33 first, generally speaking no doubt every section in an enactment is in a sense subject to every other section in the enactment or in other words all the sections have to be read together. But it will not be correct to say that S. 33 of the Act is in any other sense controlled by the provisions of S. 34 of the same Act. If there was a proceeding under S. 34 of the Act, that would undoubtedly be a proceeding which is capable of being revised under S. 33 by the Commissioner. It will therefore not be quite correct to say that S. 33 is controlled by the provisions of S. 34. But S. 33 also speaks of the Commissioner making such orders as he thinks fit only subject to the provisions of the Act. That expression clearly indicates that the power of the Commissioner to pass such orders as he thinks fit on revision is subject to the provisions of the Act. In other words, though the section says that the Commissioner may pass such orders as he thinks fit, the section indicates that the orders to be passed by him

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must be in accordance with the provisions of the Act and should not contravene such provisions. What then is the nature and scope of the power of the Commissioner to make any such re-assessment as he has done in this case? The power to re-assess is given expressly only by S. 34 and that section prescribes the condition precedent to any such valid re-assessment, the condition precedent being service within one year of a proper notice on the assessee giving notice of the intention on the part of the Income-tax Officer to re-assess. The power of re-assessment is given in express terms only to the Income-tax Officer and not to any other Officer, the Assistant Commissioner or the Commissioner. If it was intended by the Legislature that the Commissioner or the Assistant Commissioner should also have similar powers, there is no reason why all of them should not have been mentioned as in the case of S. 28. When it is a question of re-opening an assessment already completed and when the Statute prescribes the particular mode in which alone re-assessment can be effected, it is clear that the condition should be rigidly observed before the power is purported to be exercised.

Though in the letter of reference it is admitted that the Commissioner of Income-tax would not generally initiate either assessment or re-assessment proceedings, still it is claimed that as a matter of law he has the right to do so.

Having regard therefore to the terms of Sec. 34, it is impossible to recognise the right of the Commissioner to initiate any such proceedings. It may well be that no such right was expressly given to the Commissioner or even to the Assisstant Commissioner because they can always by an official direction require the Income-tax Officer to take such proceedings; and further under S. 33 the Commissioner has the power to revise any proceedings by the Income-tax Officer.

Thus from the scheme of the Act it would be clear that it is the Income-tax Officer alone that can initiate re-assessment proceedings. But if the Income-tax Officer should make a mistake and after having started re-assessment proceedings fail to re-assess the parties, the proceedings of the Income-tax Officer would undoubtedly be open to revision by the Commissioner under S. 33 and he may thereupon pass any order as he thinks fit. But it must be borne in mind that the condition precedent to this exercise of the power of re-assessment is the proper service of notice indicated in S. 34. We may even go further and indicate that in this very case although the Assisstant

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Commissioner set aside the order of re-assessment made by the Income-tax Officer on the view that the Assistant Commissioner took of the validity of the service of the notice, it was still open to the Commissioner under Section 33 to revise that order of the Assistant Commissioner, set it aside and restore the order of the Income-tax Officer. But this was not what was done or even purported to be done.

The Commissioner for purposes of his order of re-assessment assumed that the order of the Assisstant Commissioner regarding the validity of the service of the first notice was right and proper, and that finding has not been set aside.

The question then resolves itself into whether in the absence of service of notice within the year as indicated in S. 34, it is open to the Commissioner to serve another notice after the lapse of the year and seek to re-assess the parties. It seems to me having regard to the scheme of the Act that the condition precedent for re-assessment being the service of the notice as indicated in S. 34 and such service of notice not having been effected according to the findings, the Commissioner had no right to initiate further or fresh proceedings for re-assessment. The power of revision given in S. 33 is a power merely of revision and such powers cannot be regarded as being larger than the powers of a Court of Appeal. It therefore follows that so long as the Commissioner did not in revision, seek to set aside the finding of the order of the Assistant Commissioner with reference to the service of the notice, it follows we must proceed on the footing that there had been no valid service of notice within the time under S. 34 of the Act and that therefore the condition precedent for re-assessment has not been satisfied or complied with.

We find it absolutely impossible to agree to the extravagant claim actually put forward in the letter of reference that without any limitation as to time the Commissioner under the powers of S. 33 might, at any time in respect of any matter, pass any order he thinks fit, and that the Court has no right to interfere with the same. Obviously, even though no limitation of time is prescribed for interference by way of revision under S. 33, the Court would almost always incline in favour of taking the view that such exercise of power should be within a reasonable time of the proceeding sought to be revised, reasonable time being computed by the Court having regard to all the other provisions of the Act, to the facts of the particular case and the special features, if any, in it.

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Under the revisional powers, it is clear that the authority revising can only do that which the original authority could have done or ought to have done. If *ex concessis* there had been no valid service of notice of re-assessment within the year prescribed by S. 34 and therefore the Income-tax Officer had no power to re-assess after the expiry of one year, it seems impossible to agree to the contention that under S. 33 exercising the powers of revision the Commissioner could do what the Income-tax Officer could not possibly have done. The very terms of S. 33 of the Act would seem clearly to indicate that the order passed by the Commissioner is only by way of revision and limited to what could or ought to have been done by the authority whose proceeding is revised. The proceeding sought to be revised by the Commissioner on which the order of re-assessment has been made by him, could be regarded at the stage at which it was taken up by the Commissioner, only as a resolution by him to proceed under S. 34 and a mere resolution by him without the service of the notice would not be effective or sufficient to give him the power of re-assessment. We are therefore of the opinion that for purposes of initiating proceedings of re-assessment, S. 33 of the Act is subject to the provisions of S. 34 of the Act and that the Commissioner has no right of initiating or independently starting re-assessment proceedings. This answer however as indicated already, does not deny to the Commissioner, if he had chosen or thought fit to exercise it, the power to revise and set aside the order of the Assistant Commissioner and his finding with regard to the service of the notice.

Then with regard to S. 28 and the question whether that section also is controlled by the provisions of S. 34, it must be, to begin with, observed that the power to levy penalty under S. 28 is said to be, if in the course of any proceedings under this Act the Officer is satisfied that an assessee has concealed the particulars of income, etc. There can be no doubt whatever that if the Commissioner had the power of re-assessing or initiating or starting re-assessment proceedings, that would have been a proper proceeding under the Act and if in the course thereof it was clear to him that the party was guilty of the concealment of income referred to in S. 28, he might have levied a penalty.

If there had been a proper order with regard to re-assessment which was being revised by the Commissioner, there might be said to be a proceeding in the course of which it was

open to him to discover the concealment and levy the penalty. In the present case the Commissioner was not really exercising the powers of revision but was purporting to initiate and start independent proceedings. If he had no right to initiate or start independent proceedings, it follows that anything done by the Commissioner with reference to it cannot be regarded as a proceeding under the Act. If there is no proceeding under the Act, there is no room for anything being discovered in the course of such proceeding. But the question propounded is whether S. 28 of the Act is controlled by the provisions of S. 34 of the Act and we do not see how it can be said that S. 28 is controlled by S. 34. But if what was intended by the question should be, whether in respect of re-assessment proceedings, such proceedings should properly have originated by service of notice under S. 34 of the Act before any action can be taken under S. 28, it seems to us that re-assessment proceedings under S. 34 should have been started before the power to levy penalty under S. 28 is exercised. In the present case the Commissioner has undoubtedly levied penalty only purporting to exercise powers of re-assessment, but if he had no power of re-assessment it follows that there could also be no power to levy penalty.

Question (*d*) so far as the present case is concerned, has also been answered in the course of the answer to (*c*). But the language of this question leaves also much to be desired. If by the expression "assessment more than an year old" is meant re-assessment proceedings under S. 34 after the end of the year following the year of assessment, then proceedings by way of re-assessment under S. 34 are not clearly open to the Commissioner. But so far as any assessment made by the subordinate officer is concerned, there is nothing in S. 33 which prevents the Commissioner from enhancing the assessment made on the materials available.

As regards the power to levy a penalty referred to in this question, it also follows that such a power cannot be exercised, as in re-assessment proceedings, if proceedings by way of re-assessment have not been properly commenced. But if on the materials with reference to any original assessment itself it should on revision appear to the Commissioner that there has been any concealment within the meaning of S. 28, then S. 33 would undoubtedly empower him to levy penalty.

Finally, passing on to question (*a*), it follows from the answers already given to the other questions that what the

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Commissioner has purported to do was not to revise the order of the Assistant Commissioner and set aside his finding and order with regard to the service of notice and that, therefore, as there was no proper service of the notice under S. 34 of the Act, no re-assessment proceedings could have been taken by the Income-tax Officer and that the Commissioner of Income-tax has no right to initiate or start such independent proceedings himself. It also follows that the penalty levied by him which would have been proper, if he had the power of initiating or starting independent proceedings, was also wrong.

The assessees will have their costs of this reference Rs. 300 (Rupees Three hundred) inclusive of the costs of the Original Application to direct the reference.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Sheik Dawood and two others ... *Appellants* in Crl. App. No.* 103 *of* 1927 *and Petrs. in Crl. R. C. No.* 51 *of* 1927.

v.

Velayuda Semmanotti and ten others ... *Respondents in both (Petrs.).*

Sheik Dawood v. Velayuda Semmanotti.

Criminal Procedure Code, S. 517—'Property regarding which offence has been committed'—Meaning of—Forcible attempt to take away boats and nets from fishermen—Rioting—Murder in the course of rioting—Sessions Judge trying murder case—Jurisdiction to pass orders regarding delivery of boats and nets—Persons not appearing in lower court to contest application for delivery—If can complain of want of notice in the appellate Court.

Certain Muhammadans attempted to take away forcibly from the fishermen boats and nets which, they said, they were entitled to take inasmuch as the fishermen did not act up to the terms of the contract between the fishermen and the Muhammadans. This attempt started a quarrel and there was a very serious rioting. Murder of one of the Muhammadans was committed in the course of the rioting and the Sessions Judge who tried the murder case came to the conclusion that the attempt to take possession of the boats and nets was the occasion which gave rise to the quarrel which ultimately ended in the murder of one of the Muhammadans and passed an order that the boats and nets should be delivered to the fishermen,

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* Crl. Appeal No. 103 of 1927 and Crl. R. C. No. 51 of 1927— Crl. R. P. No. 44 of 1927. 21st October, 1927.

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setting aside the previous order of the Sub-divisional Magistrate which directed them to be delivered to the Muhammadans.

Held, (on revision) that the Sessions Judge was perfectly justified in interfering with the wrong order of the Sub-divisional Magistrate and had jurisdiction to pass the order.

The clause "property regarding which an offence has been committed" in S. 517 of the Criminal Procedure Code includes moveable property regarding the possession of which a quarrel is begun or a riot is begun, whatever may be the offence that might ultimately be committed in the course of the quarrel or fight.

Where only one of the three Muhammadans appeared before the Sub-divisional Magistrate and opposed the application of the fishermen for delivery of the boats and nets under S. 517 of the Criminal Procedure Code, the other two Muhammadans are not entitled to complain that they were not served with notice of the proceedings before the Sessions Judge who constituted the appellate Court.

Appeal against and petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court, to revise the order of the Court of the Sessions of the West Tanjore Division, dated 11th January, 1927, in Crl. Mis. Pet. No. 18 of 1926 (L. Dis. Ref. on P. R. C. No. 3 of 1926, Sub-divisional Magistrate, Pattukotta).

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for appellants.

Dr. Swaminathan, Counsel, for *M. Ranganatha Sastri*, for respondents in Crl. R. C. No. 51 of 1927.

The Public Prosecutor on behalf of the Crown in both the cases.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the Sessions Judge of West Tanjore, setting aside the order of the Sub-divisional Magistrate with regard to the disposal of boats and nets.

The contention of Mr. Jayarama Aiyar for the petitioners is that the Sessions Judge had no jurisdiction to pass the order as he did not enquire into the case himself and as an appellate Court he was not justified in interfering with the order of the lower court. The Sub-divisional Magistrate of Pattukotta passed an order on 19th September, 1926, with regard to the boats and nets directing that they be delivered to the fishermen. On 5th November, 1926, in modification of the previous order he passed another order that the boats and nets should be delivered to the Muhammadans.

The question for consideration is whether the order of the Magistrate, dated 5th November, 1926, was proper or improper.

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That was the order that was set aside by the Sessions Judge. The contention of Mr. Jayarama Aiyar is that there was no offence committed regarding the boats and nets and therefore S. 517 is not applicable to the case. The first clause of S. 517 runs thus :

"When an enquiry or a trial in any Criminal Court is concluded, the court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appear to have been committed, or which has been used for the commission of any offence".

The case tried by the Sessions Judge was one of murder, but the murder was committed in the course of a very serious rioting. The origin of the rioting was the attempt of the Muhammadans to take away from the fishermen boats and nets which they said they were entitled to take inasmuch as the fishermen did not act up to the terms of the contract between the fishermen and the Muhammadans. P. W. 11 who was examined by the Sub-divisional Magistrate during the preliminary enquiry stated as follows :—

"Some fifty or sixty fishermen were there drawing nets and drying them up. We asked them for our nets and boats. Accused 2 and others said 'where are your boats and nets, what money do you ask'. Accused 3 did not answer me. Hasana Lubbai then said "If you do not return the tackle to-day, I shall see how you fish to-morrow in the sea". Accused 2 and 3 then incited accused 1 to cut. The learned Sessions Judge who tried the murder case observes in paragraph 18 of his judgment : 'P. Ws. 5, 6, 7, 10, 11 and 13 went there to assist the Muhammadans. I have no doubt that it was the Muhammadans that went to sea-shore to pick up a quarrel and to take away the nets and boats from the fishermen forcibly. They also took some pariahs and pallas to help them'".

The finding of the learned Judge as supported by the evidence of P. W. 1 was that the attempt of the Muhammadans to take away forcibly from the fishermen boats, nets and tackle started the quarrel. That being so, the question is whether the clause 'regarding which an offence has been committed' governs the case or not. I am satisfied that the meaning of the clause 'regarding which an offence has been committed' includes moveable property regarding the possession of which a quarrel is begun or a riot is begun whatever may be the offence that might ultimately be committed in the course of the quarrel or fight. Mr. Jayarama Aiyar's contention is that there is no finding by the learned Judge that the boats were actually the subject of an offence. Reading the order of the learned Sessions Judge as a whole, I am satisfied that he came to the conclusion that

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the attempts to take possession of the boats and nets and tackle was the occasion which gave rise to the quarrel which ultimately ended in the murder of one of the Muhammadans, for, at page 6 he says :

"The merchants who had no possession appear to have taken the law into their own hands and wanted to take away the boats and nets by force without going to a civil court. This led to rioting and assault which culminated unfortunately in the death of one Muhammadan".

Seeing that there is this clear finding, the learned Sessions Judge was perfectly justified in interfering with the wrong order of the Magistrate, passed on 15th November, 1926.

Another point raised by Mr. Jayarama Aiyar is that two of the Muhammadans had no notice of these proceedings. It appears that only one of the three Muhammadans appeared before the Divisional Magistrate and opposed the application of the fishermen. That man was served with a notice by the Sessions Court. When a person does not choose to appear before the lower court in an enquiry, he is not entitled to complain that he had not been served with notice of the proceedings in the Appellate Court against the order of the lower court. The police seem to have handed over the boats to certain Muhammadans on taking Muchilikas. That would not give any right to the person in whose custody the boats were left to contest the right of the fishermen to the boats. I therefore decline to interfere with the order of the lower court and dismiss the appeal.

The order of the Sessions Judge will be given effect to.

N. S. *Appeal and Revn. Petn. dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Manager, Krishna Vinodha Sabha,
C. Cunniah & Co. .. *Petitioner** (*Accused*).

C. Cunniah Company, *In re.*

Madras City Police Act (III of 1888), S. 76—License to drive a bus—Contravention of conditions of—Licensee's liability to conviction for—Bus driven through prohibited streets by servant of licensee and not by licensee himself—Effect.

A person who obtains a license to drive a bus for a particular purpose is liable to conviction under S. 76 of Act III of 1888 in case the conditions of the license are contravened. The fact that he did not himself drive the bus through prohibited streets, and that it was driven by his servant does not affect his liability to be convicted under the section.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 3rd Presidency Magistrate of the Court of the Presidency

*Cl. R. C. No. 401 of 1927. 14th October, 1927.

C. Cunniah Company, In re.

Magistrates, Georgetown, Madras, in C. C. No. 4712 of 1927.

N. S. Srinivasa Aiyar for *S. Satyamurthi Aiyar* for petitioner.

P. Govinda Menon for the Crown Prosecutor on behalf of the Crown.

The Court made the following.

ORDER :—The only point urged in this case is that the manager of the theatre who did not drive the bus through the prohibited streets should not have been convicted but that the man who actually drove the bus should have been convicted, as S. 76 (Act III of 1888) contemplates only the conviction of the person who actually contravenes the conditions in the license. I am unable to accept this contention. In this case the license was given for going in a bus with music for the purpose of distributing handbills and that license was given olny for one day between 6 A. M. and 6 P. M. The license was given to the petitioner. The mere fact that he asked his servant to drive the bus would not in any way exonerate him from the conditions of the license. It is not necessary that he should actually go in the bus himself in order to make him liable under S. 76. When the license obtained is for a particular purpose and the currency of the license is only for a short time, if the person who obtains license does not himself drive the bus but makes his servant go through prohibited streets, he is as much liable as the man who drives the bus, because the servant is only the hand by which the act is done. In this view of S. 76 I think the conviction of the petitioner is right. I dismiss the petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

Giridharadoss Company, Proprietors, Sowcar Lodd Govindass Krishnadoss and four others ... *Appellants* in all the Appeals. (Petrs.-Plffs.)*

v.

Para Appadurai and others ... *Respondents (Respts.-Defts.)*

Giridharadoss Company v. Appadurai.

Decree—Construction—Payment to be made before a specified date and eviction of defendant in default—Provision for—Acceptance of payment made after date fixed—Effect on plaintiffs' right to evict defendant

*A. A. A. O. Nos. 125 to 140 of 1924. 6th September, 1927.

Giridharadoss Company v. Appadurai.

—*Forfeiture—Relief against—Power of Court in case of decree which is not by consent.*

The decree in a suit by landlords against their tenant, after directing the defendant to pay rent to the plaintiffs, mesne profits, and costs, stated in paragraph 4, "that if the defendant pays plaintiffs the arrears of rent together with interest at 6 per cent per annum and costs in both courts on or before 20th February, 1920, he be relieved as against forfeiture, and in case of default the defendant be evicted and the plaintiffs be put in possession of the respective land". The defendant paid his dues under the decree after 20th February, 1920, and the plaintiffs accepted the payment. Nevertheless the plaintiffs applied for enforcing terms of the decree and getting possession of the property on the ground that the defendant had defaulted to pay on or before 20th February, 1920.

Held that, on the right construction of the decree, the acceptance of the payment made after 20th February, 1920, was no bar to the plaintiffs' right to proceed with their application, and that, inasmuch as the defendant had defaulted in making the payment, clause 4 of the decree should be given effect to.

Relief against forfeiture cannot be granted in connection with decrees other than consent decrees.

Appeals against the orders of the District Court of North Arcot in Appeal Suits Nos. 210, 213 to 218, 222, 225, 229, 231 to 233, 235, 239 and 245 of 1923, preferred respectively against the orders of the Court of the District Munsif of Ranipet in Execution Petitions Nos. 63, 66, 68, 69, 70, 72, 73, 77, 88, 103, 105, 107, 108, 110, 117 and 132 of 1922 in O. S. Nos. 437, 443, 446, 447, 449, 456, 459, 470, 445, 438, 477, 481, 482, 484, 490 and 455 of 1917, respectively.

A. C Sampath Aiyangar for appellants.

S. A. Seshadri for respondents.

These appeals coming on for hearing on 8th September, 1926, the Court (Krishnan, J.) delivered the following

JUDGMENT :—The learned District Judge is in error in thinking that a provision for forfeiture for non-payment in a decree can be relieved against unless the decree is a consent decree. It will be found in all cases where relief has been granted, the decrees were consent decrees. On account of this error I am unable to accept the District Judge's judgment in these cases.

But before disposing of these cases finally, I must call for a finding by the lower appellate court in each of the appeals before me on the following points:

"Whether any moneys were due, if so, how much, by the tenant or tenants on 20th February, 1920, under clause (4) of the decree (in A. S. No. 49 of 1919 on the file of the Court of the Temporary Subordinate Judge of Vellore) and when, if at all, such sums were paid by the tenants into court or to the landlords " Plaintiffs have filed a list, Schedule A,

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with an affidavit setting forth this amount, the correctness of which will however have to be tested. In construing the words "arrears of rent" in clause (4) of the decree, they will be taken to include rent for faslis 1324 to 1326 with mesne profits or damages claimed in the shape of rent as clause (1) of the decree puts it for *any portion of these faslis*".

Findings will be submitted in four weeks. Time allowed for objections is seven days.

In compliance with the order contained in the above judgment the District Judge of North Arcot at Vellore submitted the following

FINDING :—The following are the amounts due by the tenants on 20—2—1920.

		Rs.	A.	P.
A. S. No. 210 of 23	...	35	8	10
" 213 of 23	...	17	14	0
" 214 of 23	...	87	13	8
" 215 of 23	...	54	0	3
" 216 of 23	...	51	1	11
" 217 of 23	...	79	8	9
" 218 of 23	...	206	10	3
" 222 of 23	...	0	3	3
" 225 of 23	...	100	14	8
" 229 of 23	...	119	11	2
" 231 of 23	...	..	..	..
" 232 of 23	...	..	..	..
" 233 of 23	...	45	9	3
" 235 of 23	...	10	2	11
" 239 of 23	...	17	4	4
" 245 of 23	...	166	2	6

2. Notes to the above.—

(*a*) Pleader for appellants at first wished to include amounts due for faslis later than 1326. I ruled that the High Court's order of remand excluded these, and he did not press this point any further.

(*b*) With reference to A. S. Nos. 222, 231 and 232 there appears to have been a statement put in (though not exhibited) in the prior proceedings by pleader for appellant in which the respondents in those appeals are said to have made payments on 23rd February, 1920. The entries were signed by pleader for the respondents in token of their correctness. He now says that he was mistaken and that payments were made before 20th February, 1920. Both pleaders agreed naturally to abide by the evidence of the

challans. The challans show that payment by these three respondents was made on 19th February, 1920.

3. The dates and amounts of payment by the respondents in the other appeals are as follows:

		Rs.	A.	P.
A. S. No. 210 of 23	23-2-20.	36	0	0
„ 213 of 23	Do.	20	0	0
„ 214 of 23	Do.	87	0	0
„ 215 of 23	Do.	59	0	0
„ 216 of 23	Do.	50	0	0
„ 217 of 23	Do.	67	0	0
„ 218 of 23	11-12-22.	206	10	3
„ 225 of 23	24-2-20.	94	0	0
„ 229 of 23	23-2-20.	125	0	0
„ 233 of 23	31-1-21.	45	0	0
„ 235 of 23	23-2-20.	8	8	0
„ 239 of 23	Do.	15	0	0
„ 245 of 23	24-2-20.	163	0	0

4. As explained in para. 2 the findings herewith submitted are agreed upon by both sides.

These appeals against appellate orders coming on for final hearing on 5th and 6th September, 1927, after the return of the above findings of the lower appellate court upon the issue referred by this court for trial, the court (Madhavan Nair and Jackson, JJ.) delivered the following

JUDGMENT :—These appeals arise out of applications filed by landholders for enforcing the terms of a decree fixing a certain time for payments and ordering eviction of the tenants from the land in default of payments within that time. The decree that is sought to be executted, decree in A. S. No. 49 of 1919, Temporary Sub-Court, Vellore, after directing the defendant to pay rent to the plaintiffs mesne profits and costs, in paragraph 4 stated "that, if the defendant pays plaintiffs the arrears of rent together with interest at 6 per cent per annum and costs in both courts on or before 20th February, 1920, he be relieved as against forfeiture and, in case of default, the defendant be evicted and the plaintiffs be put in possession of the respective land". The respondents before us not having paid their dues under the decree before the 20th of February, 1920, the plaintiffs applied for enforcing the terms and getting possession of the property. It has now been found by the lower courts that the payments made by the respondents

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were after the specified date, namely, 20th February, 1920. These payments were all accepted by the plaintiffs. The lower courts construing the decree as a consent decree allowed relief against forfeiture and dismissed the plaintiff's applications. It is now argued that since the decree is not a consent decree no relief against forfeiture can be granted. No decision has been brought to our notice where relief against forfeiture has been granted in connection with decrees other than consent decrees. The case in *Krishna Rao* v. *Balvant* (1) must be treated as a decision on the special facts of that case.

The main argument on behalf of the respondents is that the plaintiffs have already received money due to them under the decree and that therefore it is not open to them to proceed with these applications. On a construction of the decree we think it is open to the plaintiffs to enforce payment of the money even if the respondents did not pay, by resorting to court. Therefore, the fact that they have received the amounts when paid by the respondents cannot be allowed to influence the decision of the case. It is undisputed that default has been made by the respondents. The plaintiffs are now asking that effect may be given to the forfeiture clause in consequence of this default. A good deal was said on behalf of the respondents to the effect that there was a delay in getting the decree from the court and within the limited time left to them they could not possibly have made the payments in time. If they were pressed for time, the obvious course for them was to resort to the court that passed the decree and get an extension of time. That they have not done. In the circumstances, the only conclusion we can arrive at is that inasmuch as the defendants had defaulted in making the payments, clause 4 of the decree should be given effect to. Therefore, we would set aside the orders of the lower courts and ask the first court to take up the applications on file and dispose of them according to law. The respondents will pay the appellants' costs.

We fix the fee at Rs. 15 in each case. It is not denied that in three of the appeals (Appeals Nos. 132, 135 and 136) payments were made before the 20th of February, 1920; they are therefore dismissed.

A. S. V. *Orders set aside and petitions remitted.*

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1. (1925) 27 Bom. L R 678.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE TIRUVENKATACHARIAR.

Ramaswami Goundan and others ... *Petitioners** (*Petitioners-claimants*)

v.

Karuppa Mudali ... *Respondent* (*Respondent—Decree-holder*).

Ramaswami Goundan v. Karuppa Mudali

Civil Procedure Code (V of 1908), O. 21, R. 58—Claim petition—Inquiry in—Scope of—Title to attached property—Investigation of—Jurisdiction—Claimants found to be in possession on their own account—Order disallowing claim on strength of finding as to title—Jurisdiction—Setting aside of, in revision.

Where, on a claim preferred under O. 21, R. 58, Civil Procedure Code, to properties attached as the properties of a deceased judgment-debtor, the Court found that the claimants, his brothers, were in possession of the attached properties on their own account, but nevertheless rejected the claim on the ground that the deceased judgment-debtor and the claimants had been divided, that the title to the properties was in the deceased exclusively, and that on his death they came to his wife and daughters under a settlement made by him, *held* that the court exceeded its jurisdiction by trying questions of title to the property and deciding the claim on such findings and that its order must be set aside and the properties released from the attachment.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Karur, dated 18th October, 1926, and passed in E. A. No. 813 of 1926 in E. P. No. 1061 of 1925 in O. S. No. 103 of 1925.

K. S. Jayarama Aiyar for petitioners.

N. Swaminadhan for respondent.

The Court delivered the following

JUDGMENT :—In execution of a money decree passed against the assets of one Nallasami Goundan deceased, the respondent, decree-holder, attached some immoveable properties as the properties of the said Nallasami Goundan. Thereupon the petitioners preferred a claim under O. 21, R. 58, alleging that the said properties are in their possession on their own account and are not liable to be attached in execution of the decree against Nallasami Goundan. The District Munsif has dismissed their claim. In his order he finds in favour of the claimants that they were in possession of the properties attached, but he comes to the conclusion that the claim must be dismissed because upon the evidence adduced before him, he is satisfied that a *prima facie* title to the property in the judgment-debtor has been made out. The decree-holder's

* C. R. P. No. 210 of 1927. 22nd September, 1927.

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case was that the property belonged to Nallasami Goundan who had become divided from the claimants who are his brothers and that Nallasami Goundan settled his properties upon his wife and daughters as he was entitled to do. The claimants' case on the other hand was that they and Nallasami Goundan were undivided and that the properties belonged to the joint family and on Nallasami Goundan's death they became entitled to his interest also by survivorship and that the said properties are not therefore liable to be attached in execution of the decree. The District Munsif has gone into those questions which relate to the title to the property and decided them against the claimants and upon those findings he has disallowed the claim.

In my opinion the District Munsif has, in investigating the claim, entertained questions as to the title to the property attached which do not fall within the scope of the inquiry directed under O. 21, Rr. 59 to 61. In investigating the claim preferred by the claimants, the only questions which the Court is competent to consider are whether the property when it was attached was in the possession of the judgment-debtor as his own property; if such property was in the possession of some other person, whether it was in his possession in trust for the judgment-debtor, or in the claimant's occupation as the tenant of the judgment-debtor. In this case it is not upon any of these grounds that the claim has been disallowed, but it is upon the finding that the title to the properties was in Nallasami Goundan exclusively and on his death the properties have come to his wife and daughters under a settlement made by him. An investigation of such questions of title to the properties is entirely beyond the scope of the investigation directed by the Code when a claim to attached properties is preferred. As the District Munsif has in disposing of the claim petition exceeded his jurisdiction by trying questions of title to the property and deciding the claim on such findings, his order must be set aside. The possession of the petitioners to the attached properties on their own account being found, their claim should have been allowed.

I therefore set aside the order of the District Munsif dismissing the claim and in lieu thereof there will be an order allowing the claim and directing that the properties be released from the attachment. The respondent should pay the petitioners' costs in this Court and in the lower court.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

Sadaka Muhammad and another ... *Appellants** in the appeal *and Petrs. in C. M. P. No.* 3590 *of* 1927. (*Petrs. in C. M. P. No.* 2,000 *of* 1927 *on the file of the High Court*)

v.

M. Hayath Batcha Sahib and another ... *Respts. in both* (*Respts. in do.*).

Letters Patent (Madras), Clause 15 *as amended—Order refusing to stay execution in a Civil Revision Petition—Appeal*

Sadaka Muhammad v. Hayath Batcha Sahib.

No appeal lies, under clause 15 of the Letters Patent as amended, against an order passed by a single Judge of the High Court refusing to stay execution in a Civil Revision Petition.

L. P. A. No. 287 of 1927 :—Appeal under Clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Curgenven, dated 23rd September, 1927, and passed in C. M. P. No. 2,000 of 1927, praying for stay of execution of a decree of the Court of the District Munsif of Tirupathur in O. S. No. 322 of 1923, pending disposal of Civil Revision Petition No. 672 of 1927, presented to the High Court to revise the order of the Court of the District Munsif of Tirupathur, dated 19th April, 1927, in I. A. No. 151 of 1927, in the said O. S. No. 322 of 1923.

C. M. P. No. 3590 of 1927 :— Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of execution of the decree of the Court of the District Munsif of Tirupathur in O. S. No. 322 of 1923, pending disposal of Letters Patent Appeal No. 287 of 1927.

P. G. Krishna Aiyar for appellants.

Respondents were not represented.

The Court delivered the following

JUDGMENT :—This is an appeal against the order of Curgenven, J., refusing to stay execution in a Civil Revision Petition filed under S. 115 of the Code of Civil Procedure and S. 107 of the Government of India Act.

*L. P. A. No. 287 of 1927 and C. M. P. No. 3590 of 1927. 26th October, 1927.

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The first question is whether a Letters Patent Appeal would lie against the order. S. 15 of the Letters Patent as it is now amended expressly states that there is no appeal against an order made in the exercise of the High Court's revisional jurisdiction. It is conceded that no appeal would lie against an order passed by the High Court in the revision petition itself. It seems to us then that there can be no appeal against any interlocutory orders passed in the revision petition. Where a Civil Revision Petition is filed and interlocutory applications are made in the Civil Revision Petition for reliefs, the High Court can act in its exercise of revisional jurisdiction in dealing with these applications. It is difficult to see how an appeal would lie having regard to the express provisions of the Letters Patent which preclude appeals against orders passed in the exercise of revisional jurisdiction. There is no authority for the proposition that the orders on applications filed in a Civil Revision Petition filed under the revisional jurisdiction of the High Court are passed in the exercise of its appellate jurisdiction and that it is only the final order passed in the revision petition that is passed in the exercise of its revisional jurisdiction. It is difficult to see how there can be any application apart from the Civil Revision Petition filed in the High Court as a party could not, without filing a Civil Revision Petition in the High Court, ask for stay of execution of the decree in the lower court. The authorities as regards the appealability of orders passed in revisional jurisdiction prior to the amendment of the Letters Patent offer us no help whatever. The very object of the amendment was to put an end to appeals from orders passed by the High Court in its revisional jurisdiction. We think it is clear that all orders passed in applications in Civil Revision Petitions are dealt with by the High Court, in the exercise of revisional jurisdiction, and that orders passed in the exercise of that jurisdiction are not appealable under the Letters Patent.

The appeal fails and is dismissed with costs.

The petition for stay (C. M. P. No. 3590 of 1927) also is dismissed with costs.

N. S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD BUCKMASTER, LORD CARSON, LORD DARLING, LORD WARRINGTON OF CLYFFE, AND SIR LANCELOT SANDERSON.

Jewan Lal Daga and another ... *Appellants** (*Plaintiff's legal representatives*)

v.

Nilmani Chaudhuri ... *Respondent* (*Defendant*).

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Indian Evidence Act, 1872, S 159—Document not produced within proper time, available for refreshing memory of witness—Agreement for mortgage—Specific performance of—Equitable relief—High rate of interest—Compound interest, when allowable.

For purposes of S. 159, Indian Evidence Act, 1872, it is not requisite that the writing used to refresh the memory of a witness should have been *admitted* in evidence. Accordingly, a document not produced in Court within the proper time and, in consequence, *rejected* as evidence under the provisions of O. 13, R. 2, Civil Procedure Code, 1908, may nevertheless be referred to by the party producing it or his witness to refresh his memory if the document is otherwise within the purview of S. 159 of the Evidence Act. "The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice"†.

Where by an agreement for a mortgage, dated the 5th February, 1921, the defendant agreed to grant a mortgage of his immoveable property for the true amount of his indebtedness to the plaintiff, the Privy Council held that the property being identified and the terms of the loan being fixed, the document of the 5th February constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms. The plaintiff having brought a suit to obtain this equitable relief, their Lordships came to the conclusion that there was a valid agreement charging the property with whatever sum was actually due to the plaintiff, together with interest at the rate provided for in the agreement, and that a proper mortgage ought to be executed to carry out these terms.

The agreed rate of interest may be high but it will not be disallowed by the Court unless there is evidence to show that in the circumstances the agreement as to interest was so unconscionable that effect ought not

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*P. C. Appeal No. 97 of 1926. 12th December, 1927.

†(Compare O. 7, R. 18, sub-rule (2), Civil Procedure Code, 1908 : "Nothing in this rule applies to documents....... handed to a witness merely to refresh his memory". K. J. R.).

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to be given to it. "Rate of interest must vary with the risk run", and in considering the question of risk the Court should take into account (*inter alia*) the financial condition of the debtor and the rate of interest he has hitherto been paying. *Held*, under the circumstances, that interest at 21 per cent. per annum on a mortgage security, was not excessive. (See S. 3 of the Usurious Loans Act, 1918).

Compound interest, unless agreed to, cannot be allowed.

Appeal (No. 97 of 1926) from a judgment and decree of the High Court, Patna (Das and Adami, JJ.), dated the 22nd May, 1925, reversing a decree of the Subordinate Judge of Dhanbad, dated the 22nd December, 1922.

The defendant, being heavily involved in debts, entered into an agreement with one Kedarnath Daga (who was the plaintiff in the action, and being since dead, was represented by the appellants) on the 21st of September, 1920, at Calcutta, agreeing to sell to him one-half share in certain collieries belonging to the defendant for Rs. 7,25,000. At the time of the said agreement the collieries were subject to various incumbrances amounting to Rs. 8,00,000. The agreement therefore provided that, simultaneously with the execution of the conveyance, the defendant should execute an indemnity bond covenanting to pay to the plaintiff with interest all sums which the plaintiff might have to pay to discharge the incumbrances, and also that a deed of partnership should be executed providing for the working of the said collieries.

On the date of the agreement the plaintiff paid to the defendant Rs. 3,50,000 earnest money. Pending the investigation of title and completion of conveyance the parties, in accordance with the agreement, commenced working the collieries, and the plaintiff from time to time advanced Rs. 33,128-8-3 for the working expenses of the collieries, and at the defendant's request also advanced to him further sums amounting to Rs. 2,00,000.

On the investigation as to title, the same at first seemed defective. The plaintiff was anxious to get security for his advances amounting to about Rs. 5,50,000, and the defendant expressed his willingness to execute a mortgage to secure these advances. A draft of a mortgage bond was prepared.

Subsequent investigation proved that the defendant had a good title in the collieries, and the plaintiff wanted the sale-deed executed in accordance with the agreement of the 21st September, 1920. Differences arose between the parties as to whether the plaintiff had agreed to take a mortgage in

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substitution of his claim under the agreement of the 21st September, 1920.

Eventually the plaintiff agreed to give up his claim under the agreement if the defendant executed the mortgage within a reasonable time. Accordingly, a memorandum of agreement was drawn up and signed by the parties on the 5th of February, 1921. As the construction of this document was one of the main points for determination before the Privy Council, it is set out below in full :—

"1. Interest at 21 per cent. per annum.

2. Principal amount rupees five lacs and fifty thousand.

3. Any money over Rs. 5,50,000 and all interest to be paid on the day of the execution of the mortgage.

4. Costs of mortgage and in connection with the purchase due to B. N. Basu & Co. and Morgan & Co. to be paid by Mr. Chowdhury.

5. Hundis to be drawn for Rs. 5,50,000 by Mr. Chowdhury and to be renewed from time to time to the extent of the principal for the time being outstanding, the stamps on all hundis being paid by Kedarnath Daga.

6. Mr. Chowdhury to pay Mr. Daga the sum of Rs. 800 on account of costs of establishment incurred by Mr. Daga.

7. The instalments of principal to be paid for April, May and June 1921 to be Rs. 10,000 each instead of Rs. 20,000 each as mentioned in the mortgage.

8. Interest to be paid at 18 per cent. up to the approval of the draft mortgage and thereafter at 21 per cent. per annum".

Thereafter the draft of a mortgage deed was duly prepared and approved of by the solicitors of both parties ; the plaintiff had the document engrossed, which was also approved of by the defendant's solicitors. At the request of the plaintiff's solicitor the defendant's solicitor sent the defendant's cheque for Rs. 2,750 for the stamp duty for the mortgage deed and the engrossed document was duly stamped. Notwithstanding repeated demands on behalf of the plaintiff, the defendant did not execute the mortgage deed. Therefore, the plaintiff filed on the 12th of May, 1921, in the Court of the Subordinate Judge of Dhanbad the present suit.

The plaint stated that according to the accounts therein set out the defendant owed the plaintiff on that date Rs. 6,05,642-11, and that the defendant had failed to execute the mortgage and to pay the instalments of Rs. 10,000 each for April and May due as set out in the memorandum of agreement, dated the 5th of February, and in the unexecuted stamped engrossed document. The main prayers in the plaint were :—

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(a) For a declaration that a moiety share of the properties mentioned in Schedule A is charged for the sum of Rs. 5,50,000 with the interest, at the agreed rates which the plaintiff had advanced on account of purchase-money.

(b) For a declaration that under the terms of the agreed mortgage, the whole of the properties mentioned in Schedules A and B are charged and mortgaged for the sum of Rs. 6,05,642-11-0 as per account given in Schedule C.

(c) For an order that the defendant do specifically perform either the agreement dated the 21st September, 1920, and execute the conveyance in plaintiff's favour of his moiety share in the aforesaid collieries mentioned in Schedule A, and also execute the indemnity bond and the deed of partnership, or that the defendant do specifically perform the agreement dated the 5th February, 1921, and do execute the said engrossed deed of mortgage as the Court may be pleased to hold the one or the other or both specifically performable.

(d) For an order that the defendant do register and otherwise complete the said documents, that the Court will order execution, and, on defendant's failure to execute, register and complete the same, the Court may be pleased to execute and register the documents on defendant's behalf.

(e) That a decree may be given declaring the defendant's indebtedness to the plaintiff to the sum of Rs. 6,05,642-11-0 out of which a decree may be given to the plaintiff as against the defendant for immediate payment for that amount as the plaintiff may be found entitled to get from the defendant.

(f) That a declaration may be given and a decree may be passed for such interest as the plaintiff may be found entitled to get from the defendant.

(g). That such declarations and decrees may be passed for specific performance, and otherwise as the plaintiff may be found entitled to get under the circumstances of the case.

(h) That on the default of the defendant to pay three instalments a decree may be given awarding possession to the plaintiff of the properties mentoined in Schedule A.

(i) That such other or further relief may be granted as the plaintiff may be found entitled to.

The claim for specific performance of the contract of sale, dated the 21st September, 1920, did not arise in the appeal before the Privy Council.

The Subordinate Judge framed the following, among other, issues :—

5. Is the agreement of the 5th February, 1921, specifically enforceable?

(6) Has the defendant failed to perform his part of the agreement ? Has there been any undue delay or laches on his part ? Is the plaintiff debarred by his conduct from claiming specific performance of all or any of the agreements referred to in the plaint ?

(7) For what sum, if any, is the defendant indebted to the plaintiff ? Is the plaintiff entitled to claim interest therefor, and, if so, at what rate ?

(8) Are the properties described in Schedules A and B of the plaint or any of them charged or mortgaged for the claims of the plaintiff or for any portion thereof ?

(9) To what relief, if any, is the plaintiff entitled ? The Subordinate Judge's finding was that the defendant deliberately broke the contract and that he had absolutely no reason for refusing to perform it. On the question as to what relief the plaintiff ought to obtain, the Judge was of opinion that specific performance of the agreement of mortgage in the terms as set out in the agreement had been rendered impossible because the monthly instalments therein set out had never been paid. The engrossed deed, however, provided that if the defendant failed to pay any of the said monthly instalments of principal or interest, then, "notwithstanding anything hereinbefore contained", the mortgagee should at his option be at liberty to call in the moneys therein secured and should be entitled to take possession of the coal, lands, and collieries. In the opinion of the Subordinate Judge the plaintiff was entitled in the circumstances to "substantial relief and not merely to a money decree." On the analogy of the decision in the case of *His Highness Shrimant Maharaj Yaskvantrav Holkar* v. *Dadabhai Cursetji Ashburner* (1), the Court thought that in justice and equity the plaintiff should be given the relief claimed in terms of the approved engrossed deed, for otherwise fraud and falsehood would be encouraged.

The Trial Court decreed on the 22nd December, 1922, the suit with costs as follows, namely, it declared that the plaintiff was entitled to the sum of Rs. 5,50,000 with interest at 21 per cent from the 1st of April, 1921, up to the date of full satisfaction. It also ordered that the plaintiff should get forthwith possession of the properties as described in the schedule to the engrossed deed and retain possession of the same and work the collieries and pay the superior landlord's dues for rent and appropriate the balance towards the satisfaction of the dues until they were fully satisfied.

The defendant appealed against the decree of the Subordinate Judge to the High Court of Judicature at Patna. The learned Judges (Dass and Adami, JJ.), allowed the defendant's appeal and dismissed the suit. Dass, J., said in his judgment that "the terms of the mortgage bond are as hard and unconscionable as any that can be imagined, and undoubtedly shock the conscience of the Court", and that the defendant resisted the suit mainly on two grounds : (*i*) on the ground that his liability could not be ascertained except on an adjustment of accounts between the parties, and (*ii*) on the ground that he in fact owed the plaintiff Rs. 4,41,650 and not Rs. 5,50,000. The learned Judge (Mr. Justice Dass) also thought that the Subordinate Judge should not have allowed the plaintiff's witness Bishun Das to refresh his memory by referring to entries in the account books as these account books had not been accepted in evidence on the ground that they had been produced too late. Holding that Bishun Das should not have been allowed to refresh his memory by referring to the entries in the books of account, Dass, J., held that his evidence was *valueless*.

As the Privy Council approve of the procedure adopted by the Trial Court in allowing the plaintiff's witness Bishun Das to

1. (1890) I L R 14 B 353.

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refresh his memory from the account books which were kept by him and which were under his supervision, the order of the learned Subordinate Judge, dated the 6th November, 1922, is set out below *in extenso* :—

"Certain account books as they were private documents of the plaintiff were not received by the Court when produced yesterday as they were not filed in at the first hearing and as no good cause, in my opinion, was shown why they were not reproduced. The plaintiff's prayer for re-consideration of that order of the court is rejected. The plaintiff's other prayer was that the witness No. 3 (Bishun Das) in whose presence the entries in the Kucha Rokords were written and who saw the payments, may be allowed to refresh his memory by looking into such books and then to depose to the fact of certain advances of money to the defendant; the law on the point is that contained in S. 159 of the Evidence Act and also in R. 18, sub-rule 2, O. 7, Civil Procedure Code. R. 18, sub-rule 2, O. 7, provides that a document which ought to be produced in court by the plaintiff when the plaint is presented, etc, etc., and which is not produced, etc., etc., shall not without the leave of the court be received in evidence on his behalf at the hearing of the suit. The sub-rule 2 of that R. 18 does however provide that nothing in this rule..... applies to documents produced in cross-examination of the defendant's witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory. S. 159, para. 2, Evidence Act, provides that "a witness may refer to any such writing made by any other person and read by the witness within the time aforesaid (para. 1 of that section) if when he read it he knew it to be correct". It appears to me that the spirit of the law is that documents even though not received in evidence or inadmissible in evidence may be looked into by a witness who wrote such documents or in whose presence such documents were written and who read them, to refresh his memory. The learned counsel Mr. P. K. Sen for the defendant has urged that to allow the witness to look into the rejected books to enable him to refresh his memory and to depose about the entries, amounts to permit the plaintiff to adduce secondary evidence of the contents. In my opinion that contention though plausible is not correct according to the law. No authority is cited in support of that contention. The witness is under examination, he says advances of different sums of money were made to the defendant in his presence and he saw entries of such sums made in the Kucha Rokord books, he does not however, remember which specific sums were advanced on which particular dates. In such circumstances, although the plaintiff has not been allowed to put in the books as independent evidence, I think the law does permit the witness to refresh his memory by looking into the entries. I do therefore allow the witness to refresh his memory by looking into the Kucha Rokord books".

Commenting on the procedure adopted by the learned Subordinate Judge, Dass, J. observed as follows :—

"There remains the important question as to the alleged advance of Rs 1,20,000 between 12th October, and the 2nd November, 1920. Now the plaintiff did not produce his books of account at the first hearing of the suit or indeed at any time until Bishun Das came to the witness-box. Bishun Das was examined on behalf of the plaintiff on the 5th November,

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1922. On that date, as the order-sheet of the learned Subordinate Judge shows 'plaintiff filed some Rokurs and Khatas as per list with a petition stating cause for filing at this late stage'. The learned vakil for the plaintiff tendered these documents in evidence; but the learned Subordinate Judge very properly rejected them. The grounds for rejecting the documents are stated by the learned Subordinate Judge in these words :— 'Here the learned vakil for the plaintiff wants to produce some account books on which the plaintiff relies and which he produces only to-day and as in my opinion no good cause has been shown for their production at this late stage, I refuse to accept the documents. The learned counsel for the defendant most strongly objected to the documents being taken in at this stage. These are private documents and I do not think it will be legal and just to admit such documents now'. The rules as to the production of documents are stated in O. 13 of the Civil Procedure Code. R. 1 compels the parties to produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely. Now it is obvious that the first hearing of the suit does not mean the day on which the case is opened on behalf of the plaintiff and witnesses examined. It means the first day when the parties appear in court after the written statement is filed. Now it is obvious that the rule has been enacted to prevent fraud by the late production of suspicious documents: and where the documents are private documents of the parties there is no reason why the rule should be relaxed unless as R. 2 provides, 'good cause is shown to the satisfaction of the court for the non-production thereof'. In my opinion the legislature has expressed so strongly against documents being received at a late stage that, although it has given a discretion to the court to receive such documents if filed at a late stage, it has limited the discretion of the court by providing that the document should not be received unless good cause is shown to the satisfaction of the court for the non-production thereof; and it compels the court receiving any such evidence to record the reasons for so doing. In other words, the legislature has expressed a strong view that there is suspicion inherent in the late production of documents.

"The learned Subordinate Judge considered the matter whether there was any ground to receive the account books tendered on behalf of the plaintiff; and, in my opinion, he exercised a wise discretion in rejecting these documents.

"But having rejected those documents, the learned Subordinate Judge allowed Bishun Das to refresh his memory by referring to the entries in the account books, and to give his evidence as to the advances made by referring to those entries. In my opinion the course adopted by the learned Subordinate Judge cannot be justified. The question involved in the decision of the learned Subordinate Judge to allow Babu Bishun Das to refresh his memory by referring to the entries in the account books is one of prudence and not one of law; and, in my opinion, it is wrong exercise of discretion to allow a witness to give his evidence by reference to a document when there are any circumstances casting suspicion upon the document. Now as I have shown, and as O. 13 of the Code of Civil Procedure establishes beyond doubt, the legislature has certainly expressed the view that the late production of a document in itself amounts to a circumstance casting suspicion on the document.

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"Now the learned Subordinate Judge has already rejected these account books on the ground, as I suggest, that their late production was suspicious. What justification then was there in allowing Bishun Das to refresh his memory by referring to the suspicious entries in these account books? Now the vice of the procedure adopted by the Subordinate Judge is this, that he has attached the same value to the evidence of Bishun Das which he would have attached to the entries if they had been proved in the usual course. The Subordinate Judge refers to a stray passage in the evidence of the defendant to the effect that he has no ground to suspect the plaintiff's account books. Grounding himself on that admission, the Subordinate Judge says as follows : 'Hence,' that is to say, as a consequence of the admission made by the defendant, 'the evidence of P. W. 3 which he gave after referring to the plaintiff's account books may well be believed and that evidence does prove that plaintiff did advance Rs. 5,50,000 and also Rs. 31,128 odd for colliery expenses'.

"In my opinion, this is not a satisfactory way of dealing with the case........ I hold that Bishun Das should not have been allowed to refresh his memory by referring to the books of account which had been rejected by the Subordinate Judge on the ground, as I suggest, that they were suspicious, and that the evidence of Bishun Das is valueless on the point".

The plaintiff appealed to His Majesty in Council from the judgment of the High Court.

Wallach for appellant :—The terms of the mortgage bond are not hard and unconscionable. The High Court should have passed a decree for specific performance of the mortgage on account of the defendant's indebtedness to the plaintiff. The Trial Court was justified in allowing the plaintiff's witness Bishun Das to refresh his memory by referring to the account books which were kept by him and which were under his supervision.

The respondent was not represented at the hearing.

Their Lordships' judgment was delivered by

Lord Buckmaster.

LORD BUCKMASTER :—Their Lordships have not had the advantage of hearing counsel for the respondent on this appeal, but they have carefully considered the relevant documents, the evidence, and the judgments both of the Subordinate Judge of Dhanbad and those delivered in the High Court of Judicature at Patna, and they think that the appellants are entitled to certain relief refused by the High Court. The only question now raised relates to the agreement for a mortgage, dated 5th February, 1921, and made between Kedarnath Daga, represented by the appellants, and the respondent. It is therefore unnecessary to consider the previous complicated transactions between

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the parties. The pleadings do not dispute that the purpose of this agreement was to arrange the terms upon which the respondent was to grant a mortgage of property, which had formerly been the subject of an agreement for sale and partnership between the parties. This is indeed made plain by the document which refers to the proposed purchase, and the letters which precede it. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by solicitors on behalf of the respondent, and the mortgage itself was actually engrossed and the stamp paid for by the respondent.

The property being identified and the terms of the loan being fixed, the document of the 5th February constitutes an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry out its terms. To obtain this equitable relief, together with other claims since abandoned, the plaintiff, represented by the appellants, instituted these proceedings, and the defences put forward upon the only point now material are in substance two: The first, that an adjustment of account between the parties in respect of certain accommodation hundis, signed by the defendant, for the plaintiff's use was contemplated, and that the mortgage was conditional on this being done; and secondly, that the terms of the agreement are unconscionable, oppressive, and substantially unfair. That accounts were open between the parties may, in their Lordships' opinion, be accepted; the reference on the document itself which provides that money, over five and a half lakhs of rupees, is to be paid on the execution of the mortgage itself suggests that the amount of indebtedness of the defendant was not finally fixed. The Subordinate Judge thought that five and a half lakhs were in fact due, and he found this issue in favour of the plaintiff—the High Court have found that the actual amount due was four lakhs forty-one thousand six hundred and fifty rupees, and while declining to give the plaintiff any security for this sum, offered him a personal judgment for the amount if he would amend his pleadings by making a definite claim for this relief. This he declined to do, and hence the present appeal. Their Lordships have not been in a position to decide the question of the true indebtedness between the parties, the materials are not before them for the purpose; for it is plain that to a large extent the evidence would depend upon examination of the books of the various parties and the determination of whether the books themselves were trustworthy documents.

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There appears to have been the usual regrettable omission on the part of both parties to produce these books within the proper time, and in consequence the learned Subordinate Judge regarded with great suspicion the books the defendant produced, and he refused to allow the plaintiff's books to be put into evidence though he permitted him to refresh his memory by reference to their entries. This procedure has been most adversely commented on by the High Court, who regard the permission of the learned Judge as a wrong exercise of discretion. Their Lordships, however, think that the learned Subordinate Judge was right in the view he took, and S. 159 of the Evidence Act of 1872 is specific upon the point. The weight of the evidence, the objection to the document upon the ground that its not having been produced at the proper time renders its authenticity the subject of suspicion, and all other grounds upon which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous documents might lead to a grave injustice. The High Court state that, in the circumstances, the evidence of the plaintiff was *valueless*, and they accept the defendant's view that the lesser amount only was due at the date of agreement. This controversy, as already stated, their Lordships are not in a position to decide, nor does it now become relevant, since the appellants are prepared to accept the lower figure, though asserting that the higher one is correct. The real question, however, was not so much the decision as between the two money claims but the determination of the issue correctly stated by the Subordinate Judge in the issues settled on the 24th August, 1921 : "Are the properties described in Schs. A and B of the plaint or any of them charged or mortgaged for the claims of the plaintiff or any portion thereof?" and had the defendant before this asked for determination of the real amount due and submitted to the execution of a mortgage for that sum, the litigation would have been ended except as to the question of amount The High Court have, however, apparently regarded the question of amount as the determining factor of the whole dispute, and held that the claim for the larger sum was a gross and deliberate fraud and an attempt to fasten on the defendant a liability only due by regarding as given for value accommodation hundis to the extent of one lakh and twenty thousand rupees.

It is to be noted that no such defence was raised by the defendant. He disputes liability for the lesser sums, alleges

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that the parties were not *ad idem*, and relies on the other grounds already mentioned, but he nowhere charges fraud, and it would indeed be difficult to establish seeing that the defendant was independently represented by solicitors throughout the whole transaction. The agreement as to interest is certainly high, but there appears no trace whatever of the defendant protesting against it, no issue is specifically directed to the point, nor is there any evidence to show that in the circumstances it was so unconscionable that effect ought not to be given to the agreement for payment. Rate of interest must vary with the risk run, of which there is no sufficient evidence, though the defendant himself says in examination in chief :—

"During the last 4 or 5 years I had to pay Rs. 3 lakhs to Rs. 4 lakhs on account of interest. I have to pay at high rate of interest, *i. e.*, at 18 to 24 per cent. per annum since September, 1920. The extent of my debt was Rs. 17 lakhs or 18 lakhs. My debt in September, 1918 or 1919, was Rs. 8 lakhs or 10 lakhs when I used to pay interest at Rs. 9 or Rs. 10 per cent. per annum. Since September, 1920, I have to pay interest at 18 to 24 per cent. per annum to the Hundi Wallas (who lend money on taking Hundis)";

and in these circumstances their Lordships find themselves unable to say that the agreed rate was of such a character that they ought not to give effect to the agreement. It is true that in the defendant's evidence he objects to compound interest, but he says in plain terms that the rate of interest of the mortgage of which the memorandum was made on the 5th February was settled at 21 per cent. per annum. In these circumstances their Lordships think that there was a valid agreement charging the property with whatever sum was actually due, together with interest as the agreement provides, and that a proper mortgage ought to be executed to carry out these terms. The terms of that mortgage should be settled under the direction of the Subordinate Judge, but compound interest ought certainly not to be included, for it was never agreed. They have only to add, that the fact that the draft mortgage attempted to go beyond the terms of the agreement in this respect might be a good reason why that particular mortgage should not be executed, but it does not destroy the plaintiffs' claim under the agreement, for nowhere was the binding effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative unless this was first done, and, indeed, the defendant himself says: "Nothing was settled as to when there would be adjustment of account." It was, in effect, an agreement to give a mortgage for the true amount of the indebtedness, whatever this might be; nor does the fact

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that the action was begun before the account was settled deprive the plaintiffs of all right to relief. The true relief to which the plaintiff was entitled was (*a*) an account of the amount due, (*b*) the execution of a proper mortgage to secure this sum. (*a*) has now become immaterial, but their Lordships can find no sufficient ground for depriving the appellants of relief (*b*), and as the litigation has been in substance for the protection of the plaintiff's security they think the proper order as to costs is that the plaintiffs' and the appellants' costs should be added to the security, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

Reporter's Note :—(1) This decision settles an important point of practice which often arises in the subordinate courts as to the legitimate use to be made of documents which are not, for some reason or other, admissible in evidence. For instance, S. 49 of the Indian Registration Act, 1908, and S. 35 of the Indian Stamp Act, 1899, lay down that certain documents shall not be admitted in evidence unless they have been duly registered or stamped, and yet it has been held that such documents may be handed to a witness to refresh his memory; see *Rukn Abdulla Shah* v. *Dayala Mal,* (1910) 8 Ind. Cas. 233 at p. 235 : 54 Punj. L R 1910, per Sir Arthur Reid, C. J., and Mr. Justice Rattigan, and *Birchall* v. *Bullough,* (1896, 1 Q. B. 325); Woodroffe and Amir Ali's Evidence Act, 5th Ed., p. 899.

2. It may be remarked that the document of 5th February was not registered, but as it was merely an agreement to grant a mortgage, registration was not necessary; see S. 17, sub-section (2), (*v*), Indian Registration Act, 1908, and *Meenakshisundara Mudaliar* v. *Rathansami Pillai,* (1918) I. L. R. 41 Mad. 959 : 35 M. L. J. 489.

3. There is some conflict of judicial opinion on the question whether the Court will decree specific performance of a contract to take a loan of money on mortgage; see the authorities discussed in *Meenakshisundara Mudaliar* v. *Rathnasami Pillai,* (1918) I. L. R. 41 Mad. 959 : 35 M L J 489. In the case before the Privy Council, now reported, the object of the suit was not to compel the defendant to accept the loan, but to obtain the security for the money already advanced by the plaintiff, and that security having been promised by the document of 5th February, the defendant was held bound to fulfil it, and the decree which their Lordships passed in the plaintiff's favour was *in effect* for specific performance of the agreement for the mortgage; see Ghosh on Mortgage, 4th Ed., p. 70, and Lord Halsbury's Laws of England, Vol. 21, p. 75.—K. J. R.

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Straits Settlements, Singapore]

PRESENT :—LORD CHANCELLOR, LORD BUCKMASTER, LORD CARSON, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

Sime, Darby and Company, Limited, ... *Appellants** (*Defendants*)

v.

The Official Assignee of the Estate of Lee Pang Seng (a bankrupt) ... *Respondent* (*Plff.*).

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Fraudulent Preference—Singapore Bankruptcy Ordinance—Presidency Towns Insolvency Act, 1909, S. 56—Provincial Insolvency Act, 1920, S. 54—"With a view to prefer"—Question of fact—Dominant motive of the debtor—Inference properly drawn from the facts—Transfer to avert criminal prosecution for breach of trust—Onus of proof on Official Assignee.

A debtor, who was then unable to pay his debts as they became due from his own money, transferred to the appellants, to whom he was largely indebted, a quantity of rubber as security for their debt. The question arose whether the transfer was to be deemed fraudulent and void as against the official assignee in the bankruptcy. *Held,* that the result depended on the answer to be given to the question, was the transfer to the appellants made "with a view of giving them a preference over the other creditors?" within the meaning of S. 51 (1) of the Singapore Bankruptcy Ordinance, which is identical with the provision on the same subject in the Presidency Towns Insolvency Act, 1909, S. 56 and the Provincial Insolvency Act, 1920, S. 54.

The question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

Where the proper inference to draw from the facts was that the dominant motive actuating the debtor was that, in making the transfer to his creditor, he (the debtor) was only doing what he felt himself bound or compelled to do, and where it must have appeared to him that the alternative to handing over was a prosecution for criminal breach of trust, the case is not one of fraudulent preference within the statute.

When the official assignee in the bankruptcy seeks to estabish that a transfer by the debtor is void as a fraudulent preference, the onus of proof is on the assignee—he has to show that the case is within the statute. "A good deal was said in argument as to the shifting of the onus at particular point in the development of the case, but when all the circum-

*P. C. Appeal No. 90 of 1927. 28th November, 1927.

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stances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it". Judgment of Lord Dunedin in *Robins* v. *National Trust Co.* (1927 A. C. 515 at p. 520), referred to.

Judgment of the Court of Appeal (Singapore) reversed.

Appeal (No. 90 of 1927) from a judgment of the Supreme Court of Singapore in its appellate jurisdiction, dated the 10th January, 1927, reversing the judgment of the same Court on its Original Side (Deane, J.), dated the 18th August, 1926.

The material facts of the case are given in their Lordships' judgment, which was delivered by

Lord Warrington of Clyffe.

LORD WARRIGTON OF CLYFFE :—On the 10th June, 1925, Lee Pang Seng, the assignee of whose estate is the respondent to this appeal, transferred to the appellants, to whom he was largely indebted, a quantity of rubber as security for their debt. He was then unable to pay his debts as they became due from his own money. He was adjudged bankrupt on a petition presented within three months after the date of making the transfer. The question in this appeal is whether the transfer is to be deemed fraudulent and void as against the official assignee in the bankruptcy.

In Singapore the matter is regulated by S. 51 (1) of the Bankruptcy Ordinance, which is identical with the provision on the same subject in the English Bankruptcy Act.

The result depends on the answer to be given to the question, was the transfer to the appellants made " with a view of giving them a preference over the other creditors"?

There is no doubt about the law; this has long since been settled as regards the effect of the English statute, and it is common ground that the same principles are applicable to the Ordinance in Singapore.

The question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

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A word or two must be said on the onus of proof. In their Lordships' opinion, the onus is on the assignee—he has to show that the case is within the statute. A good deal was said in argument as to the shifting of the onus at particular points in the development of the case, but when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on this point becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained, and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. [See the judgment delivered by Lord Dunedin in *Robins* v. *National Trust Co.* (1)].

The action in which the present appeal arises was brought by the respondent against the appellants for the purpose of recovering the goods the subject of the transfer. It was tried by Deane, J., in the Supreme Court of Singapore, who on the 18th August, 1926, gave judgment for the appellants with costs. On the 10th January, 1927, this judgment was reversed in the Supreme Court in its appellate jurisdiction by a majority, Sir James Murison, C. J., dissenting.

At the trial the following facts were established to the satisfaction of the learned Judge.

The appellants are a company carrying on business as merchants at Singapore, Mr. John Middleton Sime being chairman of the board of directors. They have a high reputation amongst the members of the commercial community in the city.

The debtor was a Chinese merchant carrying on business under the firm name of Chin Seng and Co. The business was managed by another Chinese named Lim Soo Yan. The debtor is a son of Lu Choon Guan, now deceased, who was a share-holder in the appellant company and a director thereof. The shares form part of his estate, in which the debtor is interested. Mr. J. M. Sime was on friendly business terms with the father, but, though he knew the son, he had no business relations with him until those which resulted in the present proceedings. In January, 1925, the debtor applied to Mr. Sime for financial assistance. He told him that he was engaged in buying rubber on commission for certain firms in America, and that he wanted advances to enable him to finance these trans-

1. L R (1927) A C 515, at p. 520.

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actions. The business involved no or little risk. The debtor received instructions from the American firm to buy rubber on their behalf. The rubber thus bought in the debtor's name was then shipped to the American purchaser, the amount payable to the debtor was then covered by bills drawn on the American purchaser and discounted by a bank in Singapore before acceptance, relying, no doubt, on a credit from America. The advances by the appellants were made against each lot of rubber, and the arrangement was that they were to be repaid within a few days after the receipt of the money from the discounting bank.

Each transaction was recorded in a letter written by Seng to the appellants. All these letters were in the same form, that of the transaction of the 29th May, 1925, may be set out as an example;

"Singapore
29th May, 1925

"Lee Pang Seng
"Chin Seng & Co.,
"General Merchants.

Messrs. Sime, Darby & Co., Ltd.,
Singapore.

"Dear Sirs,

"In consideration of your having advanced me $87,887 only, being advance on 93,900 lbs. para rubber purchased by me and stored at casement, Raffles Chambers, I hereby convey the ownership of the said rubber to you and engage to act as your agent and factor in dealing with and shipping said rubber, repaying you the amount advanced as soon after the said rubber has been shipped and proceeds of drafts received from negotiating bankers.

"I undertake to keep the said rubber fully insured against fire.

"Yours faithfully,
"(Signed) Lee Pang Seng".

Advances amounting to a very large sum were made on the security of letters in the above form, and for some time all went well, the advances being duly repaid out of the proceeds of the bills, but during May, 1925, considerable delay occurred in the payment of the advances and complaints were from time to time made by the appellants, but they did not then decline to advance further sums, and on the 10th June, 1925, there remained outstanding three advances amounting together to $253,620.06, made respectively on the 29th May, the 5th June and the 9th June. On the evening of the 9th June it came to the knowledge of Mr. Sime that, in addition to the business which had been financed by him, the debtor had for some time

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been speculating in rubber, and Mr. Sime became anxious about his security. He did not, however, then or on the 10th June know more about the actual financial position of the debtor.

On the 10th June he consulted his company's solicitors, and as the result wrote the following letter to the debtor :—

"Singapore,
10th June, 1925.

"Messrs Chin Seng & Co.,
"Malacca Street,
"Singapore.

"Dear Sirs,

"With reference to the advances made by us to you against your letters of lien dated 29th May, 5th June and 9th June, amounting in all to $. 253,620.06, as we are advised by our solicitors that our security is not adequate, we must ask you to let us have your cheque to-day in repayment of the advances or deliver to us immediately ample security in the form of rubber to cover the advances.

"Yours faithfully,
"Sime Darby & Co., Ltd.,
"(Signed) J. M. Sime."

It will be observed that the letter says that it is the solicitors who advise that the security is not adequate and requires actual delivery of rubber to cover the advances. It must in their Lordships' opinion have conveyed to the recipient that it was in the nature of the security and not in the value of the rubber purported to be covered by it that the inadequacy consisted, and that what was required was actual physical possession of rubber instead of a mere paper lien over rubber remaining in the debtor's possession.

About 4 p. m. on the 10th June the letter was delivered at the debtor's place of business and was read by his manager, Lim Soo Yan. It is now necessary to state the financial position of the debtor on the 10th June as it was known to himself, though not to Mr. Sime. There is no doubt he was hopelessly insolvent as the result of speculative purchases of rubber sold by him for future delivery. During the few days preceding the 10th June and on that day he had bought from Chinese merchants large quantities of rubber, which had been delivered at his godown, but had not been paid for. He had on the 10th June after banking hours, drawn and signed six cheques for sums amounting to $92,000. His account was overdrawn and he knew that unless he obtained further credit these cheques, when presented, must be dis-

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honoured and the general collapse of his affairs would ensue. He knew also that in breach of his duty as agent for the appellants he had applied the proceeds of rubber covered by one or other of the letters of lien to his own purposes. Some of the rubber covered by the outstanding letters of lien still remained in store, but a large part of the rubber there was that bought from Chinese merchants and not paid for.

On receiving the letter of the 10th June, Lim Soo Yan rang up the debtor on the telephone and either read the letter to him or told him its contents, asking what he was to do. The answer was there was no alternative but to deliver to Sime Darby, as he could not pay the money. He told his manager not to allow them to take more than was necessary, and he asked him whether, if he allowed Mr. Sime to take away the rubber, he would go on advancing. The manager said he thought he would. Nothing further was said, and the manager thereupon, on behalf of and in the name of the debtor, wrote to the appellants the following letter :—

"With reference to your letter of even date, as it is not convenient to repay you the advances to-day please note that we have given instructions to our storekeeper to deliver to your order sufficient rubber to cover the advances made by you".

Delivery of the rubber began about 5 p. m. and continued during the night until 6 a. m. on the morning of the 11th June, the debtor's manager attending to see that no more than the proper quantity was removed.

On the morning of the 11th June two of the cheques drawn on the 10th were presented and paid, the bank apparently assuming that an advance would be made by the appellants, as on previous occasions, but about noon Lim Soo Yan was informed by Mr. Sime, on his application for further advances, that further advances would not be made. He immediately informed the bank manager. The remaining four cheques were dishonoured and the final crash came.

One further fact should be mentioned. During May arrangements were made for the formation of a limited company to take over the debtor's business, with Mr. Sime as chairman. Such a company was registered, but did not do any business, and nothing came of the scheme.

It was suggested that the last-mentioned fact, coupled with the possession by the father's estate of shares in the appellant company and the interest of the debtor in that estate, provided a motive for desiring to avoid serious loss on the appellants' part, with the possible diminution of the value of the estate.

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But no detailed facts were elicited such as were necessary to support such a suggestion, and in these circumstances their Lordships think no importance should be attached to it.

What then, is the proper inference to be drawn as to the dominant motive of the debtor? The learned Trial Judge expressed his view as follows:—

"It seems to me that the expression he used that there was no alternative but to hand over did most accurately and realistically represent what must have been in the mind of the debtor. To him, believing that he was bound by the terms of the letter, it must have appeared that the alternative to handing over was a prosecution for criminal breach of trust."

Their Lordships agree that the proper inference to draw from the facts is that the debtor believed, and on the form of the letter reasonably believed, that the appellants were entitled in the events which had happened to have actual possession of the rubber, and to put an end to the possession and power of disposition which he had as their agent, and, further, that as he had wrongly disposed of the proceeds of some of the appellants' rubber for his own purposes, he would be running grave risks if he failed to deliver rubber of his own in its place. He would be fortified in this view by the information that the demand was made on the advice of solicitors. Moreover, the manager said in evidence that he believed—

"Sime, Darby, under the letter we gave, controlled the rubber, the letter was a sort of security for the money advanced to us, and we thought it bound the firm."

In their Lordships' opinion, the dominant motive actuating the debtor was that, in making the transfer, he was only doing what he felt himself bound or compelled to do.

The possibility of obtaining further advances probably weighed with him also, but if the above view is correct it is unnecessary further to pursue this matter.

Upon the whole case their Lordships are of opinion that the official assignee failed to establish his case under the Ordinance, that the Trial Judge rightly dismissed the action, and that this appeal ought therefore to be allowed with costs, the order of the Court of Appeal being discharged, and that of the Trial Judge restored, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Mayo, Elder & Co.*

Solicitors for respondent : *E. F. Turner & Sons.*

K. J. R. *Appeal allowed.*

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Reporter's Note : This pronouncement of the Privy Council settles the law, on which there has been considerable conflict of judicial opinion both in India and in England; see the recent judgment of the English Court of Appeal in (1924) 2 Ch. 515 (*In re Cohen*), where Pollock, M. R., dissented from his learned colleagues, Warrington and Sargant, L. JJs. —K. J. R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

Tirumala Reddi Chinnappa Reddi ... *Appellant** (*Petitioner*).

v.

Kolakula Thomasu Reddi and another ... *Respondents* (*Respondents*).

Tirumala Reddi Chinnappa Reddi v. Kolakula Thomasu Reddi.

Provincial Insolvency Act—S. 43—Extension of time to apply for discharge—Grant of, after expiry of period fixed by order of adjudication—Jurisdiction—Proceedings under S. 43—Postponement of—Grounds—Challenge of sale held by Official Receiver if one—Annulment of adjudication—Person in whom property vests after—S. 37—Effect.

S. 43 of the Provincial Insolvency Act is mandatory, and the Court has no power to extend the time to apply for discharge after the expiry of the period fixed for that purpose by the order of adjudication. It is open to the debtor or any of the creditors to apply within the time limited for an extension of time, but, where this is not done, S. 43 should be allowed to take its course.

The fact that a sale held by the Official Receiver is challenged by a third party is no ground for postponing the proceedings under S. 43.

The annulment of adjudication does not necessarily revest the property in the debtor as the Court can under S. 37 of the Act give directions in whom the property should vest pending further orders.

Appeal against the order, dated 23rd December, 1926, of the District Court of Guntur in I. A. No. 256 of 1926 in I. P. No. 42 of 1923.

Ch. Raghava Rao for appellant.

A. V. Krishna Rao for respondents.

The judgment of the court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—This appeal arises out of an order passed by the District Judge, refusing to annul the adjudication of one Thomasu Reddi and extending the time within which he has to file his application for discharge. Thomasu Reddi was adjudicated insolvent on the 8th of July, 1924, and one year's time was fixed as the period within which he

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*A. A. O. No. 195 of 1927. 1st November, 1927.

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should apply for his discharge. He did not apply within the period and the time was extended to the 11th of August, 1926. As the insolvent did not apply for his discharge as required by S. 43, an application was put in on the 13th of December, 1926, by the appellant creditor to annul the adjudication. The Official Receiver submitted his report on the 22nd of December, 1926, stating that some properties were sold on the 30th of June, 1925, that a petition was filed in the District Court to set aside the sale and it was dismissed on the 5th of November, 1925, and that C. M. A. No. 149 of 1926 was filed in the High Court against the order of the District Judge and further proceedings were stayed. He states that it is regrettable that neither the debtor nor any of the creditors applied for extension of time, that the provisions of S. 43 appear to be imperative, that, in the absense of any extension of time, the order of adjudication is liable to be annulled and that it is desirable under the cirumstances to issue notice to the creditors and hear them before the order of annulment is passed. The District Judge, on this report and on the creditor's petition, passed an order refusing to annul the adjudication and extending the time to the 23rd December, 1927. Another creditor (No. 4) applied on the 10th of December, 1926, under S. 27, clause (2) of the Act, to extend the time to apply for discharge and this petition was dismissed on the ground that the court had already extended the time on the report of the Official Receiver. So far as the insolvent is concerned, he neither applied for an extension of time nor filed any petition or affidavit setting forth the reasons for his not having applied within the time fixed by the Court. The question is whether the learned District Judge was right in extending the time on the report of the Official Receiver.

It is argued for the appellant that the provisions of S. 43 are mandatory, that the court has no power to extend the time after it has elapsed, that even if it has such power, the only person to apply is the insolvent and that in any case the Judge was wrong in acting on the report of the Official Receiver especially as the report gives no reason for the application to extend the time not having been filed earlier.

For the respondent it is contended that S. 43 is only directory and not mandatory, that it is open to any creditor or to the Official Receiver to apply for an extension of time even though the time has expired and that in the present case the Judge acted within his powers and in the exercise of sound discretion in extending the time.

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The relevant sections of the Provincial Insolvency Act are Ss. 10, 27, 37 and 41. S. 27 of the Act enacts that the court shall, on making an order of adjudication, specify in such an order the period within which the debtor shall apply for his discharge and that the court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge. S. 41 enacts that the debtor may, at any time after the order of adjudication, and shall, within the period specified by the court, apply to the court for an order of discharge, that notice should be given and any objections heard by by the court. S. 43, runs as follows:

"If the debtor does not appear on the day fixed for hearing his application for discharge or such subsequent day, as the court may direct, or if the debtor does not apply for an order of discharge within the period specified by the court, the order of adjudication shall be annulled, and the provisions of S. 37 shall apply accordingly".

Cl. (2) gives power to the court to recommit the debtor to prison if he had been released from custody under the provisions of the Act and states that all processes which were in force against the person of the debtor at the time of such release shall be deemed to be still in force against him as if no order of adjudication had been made. S. 37 states that, where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts done by the court or receiver shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the court may, by order in writing, declare. S. 10, sub-clause (2) provides that a debtor, in respect of whom an order of adjudication made under the Act is annulled owing to his failure to apply or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the court by which the order of adjudication was annulled, and it states when such leave ought not to be given.

There has been a conflict of opinion as regards the power of the court to extend the time after it has expired.

In *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) an application was made by the insolvent after the expiry of the period fixed in the order of adjudication to extend the time. This application was filed after a creditor has applied to annul

1. (1923) 19 L W 418.

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the adjudication under S. 43. Waller, J., was of opinion that after the expiry of the period prescribed by the order of the adjudication for applying for discharge, the court has no power to extend the period while Krishnan, J., was of opinion that the court has power under S. 27, clause (2). Both the learned Judges, however, agreed that it was not a fit case for granting an extension of time. Waller, J., observed,

"Objection is taken to the District Judge's order on two grounds,

(*a*) that under S. 43 he had no option but to annul the adjudication,

(*b*) that he had no power under S. 27 (2) to extend the period after it had expired.

I think that both grounds are good. S. 43 is absolutely peremptory in its terms and I am of opinion that directly the court was informed of the insolvent's ommission to apply within the time fixed, the only course open to it was to annul the adjudication. That being so, it follows that no application for extension of the period can lie after it has expired. No doubt S. 148, Civil Procedure Code, allows extensions of this description; but the Code is applicable only so far as it does not conflict with the provisions of the Provincial Insolvency Act, and they are opposed to such an extension".

The learned Judge thought that the proper order would be to annul the adjudication and leave it to the insolvent under S. 10 (2) to apply if he had good cause for his delay. Krishnan, J., was of opinion that the power given by S. 27 (2) is not exhausted by the period fixed in the order of adjudication having expired, that as regards S. 43, although it says that the court shall annul the adjudication, such words have been construed by their Lordships of the Privy Council in *Badri Narain* v. *Sheo Koer* (2) in dealing with the provisions of the Civil Procedure Code to be only directory and not mandatory and that S. 148 can be invoked in aid of the power to extend the time.

In *Abbireddi* v. *Venkata Reddi* (3) the question was whether the Court had power to review an order made annulling adjudication on the ground that the insolvent did not apply for his discharge within the time fixed in the order. The petitioners were some of the creditors and they applied for a review of the order. Devadoss and Wallace, JJ., held that S. 5 of the Act made the provisions of the Civil Procedure Code applicable and that the Court had power to review its

2. (1889) L R 17 I A 1 : I L R 17 C 512 (P C).
3. (1925) 51 M L J 60.

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Kumaraswami Sastri, J.

own order. In dealing with *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) the learned Judges observe:

"It is not necessary to deal with this case in detail as the point raised here did not arise for decision there. If an expression of opinion is necessary, we would be inclined to hold with Krishnan, J., that the Court has power to extend the time for making an application for discharge, provided that the application is made before the order of annulment is made".

In *Venugopolacharriar* v. *Chimmulal Sowcar* (4) Phillips and Madhavan Nair, JJ., held that S. 43 of the Provincial Insolvency Act is mandatory and that when an order of annulment has been passed under S. 43, sub-clause (1), S.10, cl. (2) of the Insolvency Act which provides a special remedy for setting aside the order renders the provisions of O. 9, Civil Procedure Code, inapplicable. Phillips, J., in dealing with S. 43, agreed with the view of Waller, J., in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) that S. 43 was absolutely peremptory in its terms. In dealing with S. 43 the learned Judge observes:

"No provision similar to S. 43 was contained in the old Provincial Insolvency Act and it is obviously one of the provisions of the new Act that the debtor shall be obliged to apply for discharge if he wishes to retain the benefits of insolvency so as to put an end to the proceedings in Insolvency. Provisions have been enacted in S. 43 (1) that if he does not apply for discharge his adjudication shall be annulled, but it allows him in certain cases a further remedy of presenting another petition in insolvency which is the method of giving relief to persons who are prevented by *bona fide* causes from presenting their applications".

Madhavan Nair, J., also was of opinion that S. 43 is clearly mandatory. There is no conflict between this decision and the earlier decision above referred to. In the former case the application was made by some of the creditors and S. 10, cl. (2) would not obviously apply and the Court had to fall back on the Civil Procedure Code, which is made applicable under S. 5. In the latter case the application was by the debtor, in whose case a special remedy is provided by S. 10, cl. (2). These cases however are authority for the view that the Court cannot extend the time after the time fixed in the order has elapsed.

In *Ramakrishna Misra, ex parte* (5) it was held by Das and Ross, JJ., that the provisions of S. 43 are mandatory and that the court has no discretion to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge.

1. (1923) 19 L W 418.
4. (1926) 51 M L J 209.
5. (1924) I L R 4 Pat 51.

Tirumala Reddi Chinnappa Reddi v. Kolakula Thomasu Reddi.

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Das, J., after pointing out that S. 27 was a new provision introduced in the Act for remedying the defect in the existing law under which the conduct of the debtor in many cases never came under the scrutiny of the Insolvency Court and after referring to the terms of S. 41 observes:

"It is obvious to my mind that the debtor has complete discretion to apply when he likes provided he applies within the period specified by the Court. The word "shall" in S. 41 of the Act imposes in my opinion a duty upon the insolvent the breach of which involves the consequences pointed out in S. 43."

In *Roop Narain* v. *King King & Co.* (6) it was held that where the insolvent fails to apply for an order of discharge within the time prescribed, the Court has no option but to annul the adjudication though it has power under S. 37 to protect the creditors by directing that the property shall vest in a person appointed by the Court and not revest in the insolvent.

There are other decisions which take a contrary view though some of them may be distinguished from the present case on the ground that they were cases where the debtor had applied.

In *Abraham* v. *Sookias* (7) it was held by Chatterjee and Pantan, JJ., that the Court has power under S. 27, cl. (2) of the Provincial Insolvency Act to extend the time to apply for discharge even though the time originally fixed had expired. The application was an application by the insolvent. The learned Judges point out that the adjudication does not become automatically annulled if no application is made prior to the expiry of the period and observe:

"It is true that S. 43 provides that the order of adjudication shall be annulled; but that seems to indicate that it has to be annulled at the instance of the opposite party or by the Court itself, and does not stand cancelled automatically on the expiry of the period. We think that under S. 27, cl. (2), the Court has the power to extend the time even after the expiry of the period of the order for discharge."

In *Lakhi* v. *Molar* (8) it was held that S. 148 of the Civil Procedure Code gives the Court power to extend the time fixed even after it has expired, as there is nothing repugnant in the Insolvency Act to make S. 148 inapplicable. In *Fateh Muhammad* v. *Maya Das* (9) the same view was taken, the learned Judge simply following the decision in *Lakhi* v. *Molar* (8). In *K. K. S. A. R. A. Chettiar* v. *Maung*

6. (1926) 94 I C 234.
7. (1923) I L R 51 C 337.
8. (1925) 86 I C 115.
9. (1926) 100 I C 134.

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Myat Tha (10) it was held that the Insolvent Court has power to extend the time for making an application for discharge. It appears from the report that an application had been made to extend the time by a creditor before the time had expired. This case does not really touch the question as to how far the Court has power to extend the time after it has expired.

It will thus be seen that there is a conflict of opinion as to the power of the Court to extend the time under S. 43. So far as the Madras High Court is concerned the balance of authority is in favour of the view that S. 43 is mandatory and that the Court has no power to extend the time after the period specified in the order. We think that this view is the correct view to take having regard to Ss. 10, 27, 37, 41 and 43 which we have referred to. As pointed out above, S. 27 was not in the old Act but it was subsequently added and the object of the amendment is to fix some period within which matters relating to the adjudication have to be disposed of.

The word "shall" in its ordinary signification is mandatory though there may be considerations which influence the Court in holding that the intention of the legislature was to give a discretion. But in the present case we fail to see any reason why the word "shall" in S. 43 should not receive its ordinary interpretation. The object of S. 43 is to punish the debtor if he does not with due diligence apply for discharge within the time limited. It was considered by the legislature that as civil processes were stayed on adjudication it was necessary to fix some time limit within which the adjudication should either be confirmed or set aside. This is clear from the consequences which follow the annulment of adjudication. The debtor can be re-arrested and sent to jail and the decree satisfied in the ordinary way. The Act also gives the right to the debtor to apply to set aside the order. But he has to show sufficient cause for not applying within the time limited. It is open to the debtor or any of the creditors to apply within the time limited for an extension of time but where this is not done, S. 43 should be allowed to take its course.

Turning to the merits of this case, it seems to us that there is no reason why the time should be extended. As pointed out by us, the time originally fixed was extended once and none of the parties did anything. All that the Official Receiver says is that it is regrettable that nothing was done, but the mere

10. (1926) 6 Bur. L J. 5.

expression of regret cannot amount to a reasonable ground for the provisions of the Act not having been complied with. The fact that there was a sale by the Official Receiver which was challenged by a third party would not be a material consideration, as, under the provisions of the Act, sales held by the Official Receiver or the Court before the annulment of the adjudication would be valid and the mere fact that the sale is contested unsuccessfully by somebody is no ground for postponing the proceedings under S. 43. In this case no application was made by the debtor nor is there any application forthcoming setting out the reasons why he did not apply under S. 43. We do not see sufficient grounds for holding that the creditor who applied for the annulment of adjudication is not entitled to the remedy which the law gives him. We may also point out that the annulment of adjudication does not necessarily revest the property in the debtor as the Court can under S. 37 give directions in whom the property should vest pending further orders.

Tirumala Reddi v. Kolakula Thomasu Reddi. — Kumarasawami Sastri, J.

We set aside the order of the District Judge extending the time and direct that he should dispose of the matter before him according to law. As regards costs, we direct that the costs of the appellant in this appeal do come out of the estate of the insolvent.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

Authimoolam Pillai ... *Petitioner** (*Petitioner-Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Tanjore ... *Respondent* (*Respondent-Defendant*).

Civil Procedure Code of 1908, O. 17, R. 2—Dismissal of suit for default of appearance—Pleader and party both present in court—Each saying to court that he cannot go on with suit—Dismissal of suit in case of.

Authimoolam Pillai v. The Secretary of State for India in Council.

Where the pleader and the party are both present in court, and the pleader says that he is not prepared to go on with the suit, and the party also says that he is not prepared to go on, and the suit is dismissed accordingly, the dismissal is one for default of appearance under O. 17, R. 2 of Civil Procedure Code.

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*C R P No. 546 of 1925. 4th November, 1927.

Authimoolam Pillai v. The Secretary of State for India in Council.

Generally, where a pleader says he is not ready to go on and does not go on, the dismissal cannot be said to be anything else than a dismissal for default, and the presence of the party in court will not take the case out of the category of "dismissal for default of appearance".

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the. Court of the Subordinate Judge of Tiruvalur, daed 2nd October, 1924, and made in I. A. No. 521 of 1924 in O. S. No. 20 of 1923 on its file.

T. M. Krishnaswami Aiyar and *K. S. Desikan* for petitioner.

The Government Pleader (*P. Venkataramana Rao*) for respondent.

The Court delivered the following

JUDGMENT :—This petition arises out of an order of the Subordinate Judge refusing to restore a suit dismissed by him. The facts are shortly these. The plaintiff who is a resident out of British India filed this suit against the Secretary of State for India in Council to recover certain sovereigns which were confiscated. As he was away out of British India an application was made for security for costs and security was ordered. He did not give security within the time but filed an application for extension of time to give security. As regards the suit itself it was adjourned more than once and the final disposal of the suit and the petition to extend the time for security came on together. An order was passed extending the time and accepting the security, but, when the case was taken up, the plaintiff's pleader said that he was not prepared to go on as the witnesses subpoened were absent. The party was also present at that time and he too was not prepared to go on with the result that the Subordinate Judge dismissed the suit.

It is argued before us by Mr. Venkataramana Rao that the dismissal was not one for default but one under O. 17, R. 3, as the Judge asked the plaintiff to give evidence but he did not do so. It is contended by Mr. Krishnaswami Aiyar on the other side that the Subordinate Judge dismissed the suit really because the plaintiff was not prepared to go on and there was no order requiring him to give evidence on a particular date which was disobeyed and also states that the Full Bench ruling in *Pichamma* v. *Sreeramulu* (1) settles the question as to what is to be done in case a party does not appear even though there is an order of Court directing him to do a certain act on a

1. (1917) I L R 41 M 286 : 34 M L J 24 (F B).

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particular date. It is unnecessary to consider this question further as the order of the Subordinate Judge itself shows that the learned Judge treated it as one for default of appearance and not as one for failure to do a particular act which he required the party to do. Treating the case as one for dismissal for default, the question is whether a suit can be dismissed under O. 17, R. 2, where the pleader and the party are both present in Court and the pleader says that he is not prepared to go on, and the party also says that he is not prepared to go on. On this question, the balance of authority is in favour of the view that such a dismissal would amount to one under O. 17, R. 2, which corresponds to old S. 157.

The decisions in *Gopala Row* v. *Maria Susaya Pillai* (2) and in *Kaliayappa Mudaliar* v. *Kumaraswami Mudali* (3) which are decisions of benches support the contention of the appellant that, where a vakil says he has no instructions, the presence of a party in Court would not take the case out of the category of 'dismissal for default of appearance'. We may point out that under the Civil Rules of Practice the party cannot conduct his case so long the vakalat to his vakil is in force (page 2 of the Rules and Orders) and under O. 3, R. 4 of the Civil Procedure Code the vakalat can be cancelled only in the manner stated therein. No doubt the view in *Gopala Row* v. *Maria Susaya Pillai* (2) and *Kaliyappa Mudaliar* v. *Kumaraswami Mudali* (3) has not been approved by single Judges of this Court. In C. M. A. No. 69 of 1925 Madhavan Nair, J., was prepared to follow the view taken in *Kaliyappa Mudaliar* v. *Kumaraswami Mudali* (3) while Curgenven, J., took an opposite view. Odgers, J., was inclined to take a different view in *Viswanatha Asari* v. *Sami Asari* (4). But it is pointed out in *Kaliyappa Mudaliar* v. *Kumaraswami Mudali* (3) that the balance of authority of the other High Courts is also in favour of the view taken by two benches of this Court. Such being the case, we do not think it necessary to dissent from the current of authority and to hold that where the party is present when his vakil says he has no instructions it makes the order inapplicable. As to the phrase 'no instructions', it is difficult to lay down any hard and fast rule as to what is meant by it. "No instructions" is sometimes used when a party does not pay the fees to the vakil; it is sometimes used when he does

2. (1906) I L R 30 M 274 : 17 M L J 225.
3. (1926) 51 M L J 290.
4. (1923) 18 L W 209.

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not go to him at all; and it is used just to show that he is not ready to go on. Generally, where a pleader says he is not ready to go on and does not go on, it is difficult to see how the dismissal can be said to be anything else than a dismissal for default. We say nothing about the merits of this case and we direct the Subordinate Judge to take the application on its merits and see if sufficient cause has been shown for restoring the suit.

Costs to abide and follow the result of the application.

A. S. V. *Application remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

Hanumantha Goundan and four others ... *Appellants** (*Defendants*).

v.

T. V. Doraiswami Pillai and five others ... *Respondents* (*Plaintiffs*).

Hanumantha Goundan v. Doraiswami Pillai.

Lease—Rent—Lessees' liability for—Default of lessor to deliver possession of entire property—Lessee obtaining and retaining possession of portion—Liability for rent in case of—English and Indian laws—Method of fixing liability—Interest on arrears of rent—Liability for.

A mittadar granted a permanent lease of three villages, but failed to deliver possession of two of them to the lessee. The lessee obtained possession of the third and remained in possession thereof. On a question arising as to whether the lessee was liable for any, and, if so, for what proportion of the rent fixed by the lease, *held* that, though, on failure to obtain possession of the entire property demised, it was open to the lessee to repudiate the entire contract, yet that, inasmuch as he chose to remain in possession of one of the villages demised, he was liable for the proportionate amount of rent due on that village, that amount being arrived at by taking the rent fixed as a whole and the income of the three villages leased as a whole and then calculating what the proportionate rent would be on the income derivable from the village in the possession of the lessee.

Held further that, as the lease deed contained a condition that the lessee should be bound in the case of default by the provisions of the Rent Recovery Act of 1865, the lessee was liable also for interest on arrears of rent.

The rule of English Law that when a lessee is evicted owing to default of his landlord he can suspend payment altogether although he remains in possession of a portion of the property does not appear to have been applied in this country.

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*A. S. No. 61 of 1926. 14th October, 1927.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in O. S. No. 11 of 1923.

Hanumantha Goundan v. Doraiswami Pillai.

B. Somayya and *T. L. Venkatarama Aiyar* for appellants.

H. Suryanarayana and *S. Venkatachala Pillai* for 1st respondent.

The judgment of the Court was delivered by

Phillips, J.

Phillips, J. :—The history of this case is somewhat complicated. The facts necessary for the decision of this appeal are as follows:—One Bommi Achi, the mittadar of Thiriyalam, granted a permanent lease to defendants' predecessors in October, 1874, of the villages of Kudiyanakuppam, Kaveripattu and Ellapalle. The lease was to take effect from the 1st of July, 1875. Before that date the mittadar executed a usufructuary mortgage deed on the 27th February, 1875, Ex. E-1, in favour of Narayanaswami Reddiar, and this was executed in discharge of a prior hypothecation of 1865, Ex. A. As the result of these transactions the lessees under the permanent lease, Ex. D, were unable to obtain possession of all the three villages and only obtained possession of one, namely Kaveripattu. Subsequently, in 1876 the lessees obtained an assignment of the mortgage right over the village of Kudiyanakuppam and fi[illegible] at a later date, he obtained possession of Yellapalle, but not unc[illegible] the permanent lease. A suit was brought for the redempt[illegible] of the mortgage on Kudiyanakuppam in 1914 and a decree was obtained, but that decree so far has not been executed, and plaintiff now seeks to enforce his claim to rent in respect of the village of Kaveripattu. He claims in his plaint to be reimbursed the peishcush payable on that village and also to receive a proportionate amount of the rent fixed for the three villages jointly.

The appellants-defendants contend that at the time that they were let into possession of Kaveripattu and the mittadar failed to give possession of the other two villages there was an arrangement under which it was agreed that no rent at all should be paid for Kaveripattu. There is no documentary evidence of this agreement modifying the provisions of the registered documents, Exs. D and D-1, and the only documentary evidence that is at all relevant is the recital in Ex. E-1, an usufructuary mortgage of Kudiyanakuppam in favour of Narayanaswami Reddi, in which it is said that arrangement had been made with the lessees that the mortgagee and not the lessees should enjoy possession of the land until the

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mortgage amount had been paid off. Apart from that there is only the oral evidence of an old man who wrote some of these documents, but he is not very clear, and the Subordinate Judge has not believed the oral evidence. In view of the great improbability that such an arrangement completely modifying the terms of the permanent lease should have been entered into orally, we are unable to disagree with the conclusion arrived at by the Subordinate Judge. Plaintiff alleges that there was no separate agreement and, in view of the fact that defendant has failed to prove his agreement, it remains to consider what is the result of what has transpired. The lease is for three villages and when the mittadar failed to give the lessee possession of the whole leasehold it was open to him to repudiate the entire contract. He did not do that but remained in possession of a portion of the property. As he has chosen to remain in possession of this portion of the property, he is under certain obligations to his landlord the owner of the land. This obligation has been recognised on various grounds, such as the doctrine of apportionment of the old lease, or an implied new contract of lease or else a liability to pay a reasonable sum for use and occupation. On whatever ground it is put, such obligation was recognised in *Meenakshi Sundara Nachiar* v. *Chidambaram Chetty* (1) and is applicable here. The English doctrine which lays down that when a lessee is evicted owing to default of his landlord he can suspend payment altogether although he remains in possession of a portion of the property does not appear to have been applied in this country and the observation of the Privy Council in *Katyayani Debi* v. *Udoy Kumar Das* (2) is no authority to the contrary.

It remains then to consider what is the amount payable by the lessee. In the lease deed a rent of Rs. 1181 was fixed, of which Rs. 781 were to be paid on behalf of the lessor to Government as peishcush, the balance being payable to the lessor himself. Plaintiff's contention that this is a contract for payment of the peishcush on each of the villages cannot be upheld for that is not one of the terms of the contract. There was merely a direction by the landlord that a portion of the rent should be paid to Government in discharge of the peishcush due by the lessor. That in no sense involves a contract by the lessee to pay the amount of peishcush on each of the three villages. It is therefore not material to ascertain what would be the exact peishcush on each of the three villages if

1. (1912) 23 M L J 119.
2. (1924) L R 52 I A 160 : I L R 52 C 417 (P C).

they were separately registered. Documents have been filed in which statements have been made mentioning the respective peishcush of each village but they need not be considered now. We have to take the rent as a whole and the income of the whole property and then calculate what the proportionate rent would be on the income derivable from Kaveripattu, the portion in the lessee's possession. Accounts have been filed, Exs. III to X, and, applying the figures of the income therein contained without deducting the remissions granted each year we find that the proportionate amount of rent due on Kaveripattu is Rs. 452. It would be therefore equitable to fix the amount at Rs. 450 per annum. The plaintiff has also claimed interest on the arrears at 12 per cent. per annum and this has been allowed by the Subordinate Judge. It is contended in appeal that the facts do not justify the claim for interest under the Interest Act, and there has been no demand made before suit. This is correct, but there is a condition in the lease that the lessee shall be bound in the case of default by the provisions of Act VIII of 1865. On arrears of rent interest would be payable under that Act, and the rate fixed by the Estates Land Act, which is now in force, is 6 per cent. We think therefore that plaintiff is entitled to 6 per cent. interest on the rent from the date of accrual to the date of decree and after that on the total decree amount. Plaintiff also claims road cess paid by him which is also provided for in the lease. It is agreed that the annual amount due for road cess is Rs. 43-4-0 and that will be provided for in the decree, and it will also carry interest at 6 per cent. from date of payment by plaintiff. The lower court's decree will be modified accordingly and the parties will pay and receive proportionate costs throughout.

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A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE JACKSON.

S. Kanthavadivelu Mudaliar and another ... *Appellants** (*Plaintiffs*)

v.

Ramaswami Mudaliar and another ... *Respondents* (*Defts.*).

Kanthavadivelu Mudaliar v. Ramaswami Mudaliar.

Madras Hereditary Village Offices Act (III of 1895), S 6—Effect—Appointment by Collector of a person not belonging to one of the

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*S. A. Nos. 29 and 30 of 1925. 21st October, 1927.

Kanthavadivelu Mudaliar v. Ramaswami Mudaliar.

families specified—Declaration of invalidity of—Suit by members of those families for—Cause of action—Family in S.—Meaning—Member of family—Father's sister's son of a Hindu, if a.

The fact that an obligation is, by S. 6 of the Madras Hereditary Village Offices Act, III of 1895, cast upon the Collector to select persons from certain specified families does not necessarily include or imply the creation of a corresponding right in those families; an appointment made by the Collector of a person who does not belong to the families specified cannot be regarded as an infringement of any such right, and a person belonging to one of such families has no cause of action to maintain a suit for a declaration that an appointment made by the Collector of a person not belonging to one of such families was not a proper appointment.

Quaere :—Whether, in any event, a suit by one of the members of the aggrieved family without making the other members parties would be maintainable.

Meaning of the word "family" in S. 6 of Act III of 1895 :

Quaere :—Whether the father's sister's son of the last holder of the office, who was a Hindu, would be a member of his family within the meaning of the section.

Second appeals against the decrees of the Court of the Subordinate Judge of Coimbatore, dated the 9th September, 1924, in A. S. Nos. 69 and 67 of 1924 (A. S. Nos. 354 and 344 of 1923, on the file of the District Court, Coimbatore), preferred against the decrees of the Court of the District Munsif of Udumalpet in O. S. Nos. 915 of 1922 and 19 of 1923, respsctively.

T. R. Ramachandra Aiyar with *S. R. Dikshit* and *S. Srinivasa Aiyar* for appellants.

The Government Pleader and *S. Muthiah Mudaliar* for respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

JUDGMENT :—*Srinivasa Aiyangar, J* :—These two appeals arise out of suits instituted with reference to the Madras Heriditary Village Offices Act III of 1895. The facts are briefly these. The village relating to the suit office was constituted into a separate village by separation and thereupon under S. 6 of the said Act new village offices were created in respect of the village. The Collector whose duty it is to select persons for the purpose of appointing to those offices is directed by S. 6 as follows :—

"In choosing persons to fill such new offices the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished".

It appears that the Collector appointed to the village office in question the predecessor in interest of the 1st defendant in the

suit. The plaintiff has instituted the suit for a declaration that the appointment by the Collector of the 1st defendant's predecessor was not a proper appointment having regard to the said provisions in S. 6 of the Act. The plaintiff's contention was that the 1st defendant was related to the holder of the office abolished as his father's sister's son, and that he himself the plaintiff was related to him as his father's brother's son, that, according to the proper construction of the expression 'family' in the clause above referred to, he the plaintiff was a member of the family within which choice has been directed to be confined by the statute and that the defendant's predecessor being only the son of the last holder's sister was not such a member of the family.

Kanthavadivelu Mudaliar v. Ramaswami Mudaliar.

Srinivasa Aiyangar, J.

The first question that arises for determination is whether the plaintiff has any cause of action to sustain the suit. That depends on the further question whether the appointment by the Collector resulted in any infringment of the right vested in the plaintiff. For the purpose of the consideration of this question we might assume that the plaintiff is or represents his entire family. Then can it be said that the action of the Collector in not choosing a person from the family of the plaintiff resulted in any infringement of the right of the family itself. It has been argued by Mr. T. R. Ramachandra Aiyar, the learned vakil for the appellant, that when the legislature casts an obligation or duty on the Collector to select a person from the family, the family gets a corresponding right as a matter of course. It is impossible to accede to any such contention. It is one thing to cast on a person a duty to do a certain thing and another thing altogether to say that by reason thereof any right in respect of it is created in a third party. If the legislature had intended to create such rights in the families to the office there was no difficulty whatever in using apt language to indicate such intention. That has not been done. On the other hand that the legislature treated the old offices as entirely abolished and provided for the new offices being created would almost seem to indicate that the true intention of the legislature was that in the appointment to the new office so created the officers of Government should not be hampered by any such claims. As it is clear that there might be an obligation cast on an officer to make a selection from a particular group of persons and such obligation need not necessarily include or imply the creation of a corresponding right in such group of persons, it follows that from the mere fact that such obligation has been cast on the Collector we cannot spell out a right in the

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family. The view that we have taken has also been taken by Mr. Justice Napier in the case of *Krishnaswami Naidu* v. *Akulammal* (1). Though it was only an expression of opinion by the learned Judge and was not necessary for the decision of of the case before the Court, still we may notice that the view taken by that learned Judge was the same that we have arrived at on a consideration of the section. If therefore there is no room for construing that there was any right created in the family itself, it follows that an appointment made by the Collector could not be regarded as having in any manner infringed any such right.

So far we have considered the question on the assumption that the plaintiff may be regarded as representing the family It must be noticed also that the plaintiff has not chosen to make the other members of the family parties to the suit even though an objection with regard to it appears to have been taken at a very early stage in the suit. In the view we have taken it becomes unnecessary to discuss the other question, namely, whether the 1st defendant who has been appointed by the Collector should be regarded as contended for by Mr. T. R. Ramachandra Aiyar as not being a member of the family. It seems to be a much more difficult question to solve. The expression 'family' undoubtedly has a very vague connotation and used as it has been in an enactment which refers to persons of all nationalities and denominations it necessarily follows that the expression 'family' would have to be construed with special reference to the community with regard to which the question might arise. It is also an expression which has various connotations varying according to the context in which it may come to be used. It is possible that many difficulties may arise if the question should be required to be decided. But as it is unnecessary for the decision of this appeal we prefer not to express any opinion with regard thereto. In the result the second appeals fail and are dismissed with costs.

A. S. V. *Appeals dismissed.*

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1. (1918) 9 L W 90.

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM, MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Doraiswami Gurukkal and another ... *Appellants** (*Plaintiffs*)

v.

Subramania Gurukkal and others ... *Respondents* (*Defendants*).

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Doraiswami Gurukkal *v.* Subramania Gurukkal.

Madras Estates Land Act, Ss 24, 3 (11)—Rent—Enhancement of—Claim to—Water-cess recovered by Government from landholder for use of Government water by a ryot—Claim of landholder to recover same from ryot if a claim for enhancement of rent—S. 30 of Estates Land Act—Enhancement of rent within the meaning of.

Held, by Ramesam and Wallace, JJ., (Jackson, J. dissenting): When a ryot uses, for the cultivation of a land in his holding, water from a Government tank and for the use of such water so taken the Government recovers an amount as and by way of water-cess from the landholder, the claim of the landholder to recover such amount from the ryot is not a claim for an enhancement of rent within the meaning of S. 24 of the Madras Estates Land Act.

Per Ramesam, J. :—In any event, the claim is not an enhancement to which S. 30 of the Madras Estates Land Act would apply. S. 30 applies only to enhancements which might be regarded as permanent at the time of the application, that is, as continuously operating in the future as far as one can see until some new circumstances arise which require another enhancement or reduction, but not to cases where it is known the conditions may be constantly fluctuating. Such adjustment of rent to meet the fluctuating circumstances is not a case of enhancement at all.

Per Wallace, J. :—*Quaere* :—Whether such a claim by the landholder on the tenant is a claim for "rent" as defined in the Madras Estates Land Act.

Such a claim is an additional charge for additional facilities supplied to the land, and is not an enhancement of the existing rent. Such a charge does not become an enhancement merely because there was an omission to charge it when the water was first taken. The original contract rights have not been interfered with or curtailed in any way.

Per Jackson, J. :—The claim in question is rent within the meaning of the Estates Land Act.

That the enhancement may vary from year to year or even not be imposed at all does not make it any the less an enhancement. It cannot be said that the lawful rent only comprises such items as are constant, and independent of circumstance, and any additional charge made owing to increased facilities enjoyed in any one year, is no enhancement of rent. That would seem to be contrary to the intention of S. 30 of the Act.

Second Appeals against the decrees of the District Court of Chingleput in A. S. Nos. 241 to 245 of 1923 and 252 of 1923,

*S. A. Nos. 252 to 257 of 1925. 19th December, 1927.

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preferred against the decrees of the Court of the Sub-Collector of Chingleput Division in Summary Suits Nos. 108, 141, 142, 146, 154 and 144 of 1922 respectively.

A. Krishnaswami Aiyar for appellants.

K. V. Ramachandra Aiyar for appellants in S. A. Nos. 256 and 257 of 1925.

K. Desikachari for respondents in S. A. Nos. 252 and 254 of 1925.

The Court (Srinivasa Aiyangar and Curgenven, JJ.) made the following

Srinivasa Aiyangar, J.

ORDER OF REFERENCE TO A FULL BENCH.—*Srinivasa Aiyangar, J.* :—The question of law for determination in these Second Appeals is one not entirely free from difficulty and is also likely to arise frequently.

The plaintiffs instituted the suits from which these Second Appeals have arisen as dharmakarthas of Sri Venkateswaraswami temple in Kadapperi Village in Chingleput District, to which temple the village had been granted as shrotriyam. The suits were instituted in the Court of the Deputy Collector of Chingleput Division under S. 56 of the Madras Estates Land Act for the acceptance by the defendant ryots in the said village of an amended patta and the execution by them of a corresponding muchilika.

The chief matter relating to the amendment and the main dispute between the parties was in reference to cl. (2) in the patta tendered for acceptance. That clause runs in the translation as follows:—

"Since for raising second or third crops on the single crop nanja land among the lands referred to in paragraph 1, and for raising first, second or third crops on the poramboke varappathu nanja lands, they have to be irrigated with the Madurantakam tank water, and since the Government charge the Shrotriem office, water-cess at the rate of Rs. 4 per acre for the first crop, Rs. 2 for the second crop and Rs. 2 for the third crop, you shall pay the amount of that water-cess together with merai, road-cess, etc."

It was admitted by Mr. Alladi Krishnaswami Aiyar for the appellants that the clause as translated is not very accurate, and it was also conceded that the liability to pay the water-cess at the rate specified in the clause should be made distinctly to arise, only, if firstly the tenant should use the water of the Government tank of Madurantakam for the purpose of raising nanja crop on land which is not entitled to such water or for raising second and third crops on land which is not entitled to

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Srinivasa Aiyangar, J

supply of water free for such second and third crops, and secondly if the landlord should have to pay the Government such amounts for the use of water as aforesaid by the tenant.

The question then is whether the claim of the plaintiffs that the defendant-tenant is liable to make such payment conditioned as aforesaid is sustainable in law. To begin with, it may be observed that no objection has been taken or could indeed be taken for the insertion of such a clause in the patta if the decision should turn out to be that there is such a liability on the tenant. The learned Sub-Collector, so far as this question was concerned, disallowed the clause on the ground that the claim of the plaintiffs-landlords for payment of the cess in addition amounted to an enhancement of rent within the meaning of S. 24 of the said Act, and that therefore the suit not having been instituted under S. 30 for such enhancement the claim was not sustainable.

On appeal by the plaintiff the learned District Judge took the same view and confirmed the decree of the Court of First Instance. The point for determination and indeed the only point that has been argued before us, thus resolves itself into a very short compass, whether the claim of the landlord for the payment of these amounts constitutes an enhancement of rent. The question has really to be decided only on the language of two or three sections of the Act. The difficulty I have already referred to in coming to a conclusion with regard to this question has not been decreased by the manner in which the question has been discussed by some learned Judges of this Court in the decisions to which we have been referred.

Altogether apart from the sections of the Act and on principle and the reason of the thing, it may be stated that if the tenant uses Government water in excess of the mamool and for that the Government makes the landlord pay a certain amount in excess, the landlord should undoubtedly be entitled in law to recover the same from the tenant without considering any question of the precise procedure to be followed. The result of holding in such a case as this that the landlord has no right to levy such amount from the tenant would be that in respect of land for which he recovers from the tenant a sum of Rs. 2-10-0 per acre he would have to pay to the Government in addition to the peishkush Rs. 8 per acre. This undoubtedly would be seen to be very inequitable and almost monstrous. But no doubt if, on a consideration of the question, that should happen to be the inevitable result, it

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cannot be helped. The question is therefore whether that is the necessary conclusion to be drawn on a consideration of the language employed in the statute. Before I proceed further, it may be as well to point out that, though the plaintiff's claim in respect of the matter has been rejected, because his proper remedy is to sue for enhancement of rent under S. 30 of the Act, on an examination of the various clauses of that section, it turns out that he could not, even if he were so disposed, file such a suit under that section in respect of the present matter. A claim for enhancement under that section may be made under clause (1) if the average local prices had risen, under clause (2) if the productive powers of the holding should be increased by any improvements effected by or at the expense of the landlord, under clause (3) if a work of irrigation or other improvement has been executed at the expense of the Government and the landlord has been lawfully required to pay in respect of the holding an additional revenue or rate to Government in consequence thereof, and under clause (4) if the productive powers of the land held by the ryot have been increased by fluvial action.

The only clause under which such a claim by the landlord, as in this case, may be regarded as possibly falling is clause (3). On a careful consideration of that clause, however, I have no doubt that the present claim of the plaintiffs cannot be regarded as falling under that clause. The necessary condition for the application of that clause is as stated "that a work of irrigation or other improvement has been executed at the expense of Government" and it is in consequence thereof that the Government has required the landlord to pay the additional revenue or rate. There has been not even a suggestion in this case of a work of irrigation or other improvement having been executed at the expense of Government. The Madurantakam tank is conceded to be an old tank and the demand against the landlord by the Government is not on the ground of any new irrigation work or improvement.

I may also observe that the tense of the verb used in the clause is the present perfect tense, namely, "has been executed" refers indubitably to some work recently undertaken and finished, the demand of the Government being in consequence thereof.

It therefore follows, even if the landlord in this case should have chosen to proceed under S. 30 of the Act, that section would not be applicable and he would not be entitled to a decree

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It thus follows that, so far as the direct authority of the previous decisions of this Court goes, it is entirely in favour of the contentions now put forward on behalf of the appellants, and it now remains for me only to refer briefly to and set out the grounds on which I have, apart from authority, arrived at the same conclusion.

The expression "enhancement of rent" in ordinary English parlance may apply to two different things; firstly to any increase in the amount payable by the tenant to the landlord in relation to the holding and secondly to a larger amount being required to be paid by the tenant to the landlord in respect of the very things that a tenant has been previously enjoying and without any further advantages. Logically speaking, it is only the latter that can be regarded as constituting a real enhancement of rent. If in the place of half a dozen rooms in a flat the tenant comes to occupy two more rooms and the rent is proportionately increased, it cannot, properly speaking, be called an enhancement of rent; similarly, if the rent of the tenant should be increased, let us say, for electric lights installed in the house by the landlord.

Now taking S. 30 of the Estates Land Act, it is clear that clauses (2), (3) and (4) in that section cannot properly be regarded as cases of enhancement of rent within the stricter meaning of that expression and it is only, if at all, a case provided in clause (1) that can be regarded as a case of real enhancement. But even there it may cease to be regarded as such, if the real rent payable by the tenant to the landlord should be taken to be a share of the crops and the money rent agreed to should be regarded merely as a commutation in money. But the legislature has spoken of all the cases as cases of enhancement of rent, and therefore we must take it that the sense in which the expression "enhancement of rent" has been used in S. 30 of the Act is the wider one. Then when we come to S. 24 and find a provision that the rent of a ryot shall not be enhanced except as provided by this Act, the question comes to take the form whether the enhancement of rent within the meaning of that section would include a claim of the kind made in this case. Thus we go back to the definition of rent in clause (11) of S. 3.

It seems to me that the matter can be regarded in two ways: firstly, that when the latter part of the definition clause speaks of whatever is payable on account of the use and enjoyment of water such water is referred to be water supplied or taken for cultivation of land. The words "supplied" and

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any dispute as regards the rate of rent and the claim did not amount to enhancement of rent though under S. 11 of the old statute, the Rent Recovery Act.

In the case of *Battina Appanna* v. *Sree-manthu Raja Yarlagadda Venkataramalinga Bahadur Zamindar Garu* (3) Seshagiri Aiyar and Kumaraswami Sastri, JJ., held that the Zamindar is entitled to the water rate paid by him to the Government for water taken by the tenant. The learned Judges also held distinctly that, though such a claim would fall under the definition of rent in clause (11) of S. 3 of the Estates Land Act, there was no question of enhancement of rent in such a case. It is true that the judgment of the learned Judges in this case is not as clear or explicit as might be desired and is also open to criticism which my learned brother in the course of the discussion in this appeal was inclined to make against it that the grounds on which the learned Judges came to hold that it was not an enhancement do not appear. But at the same time it is undoubtedly distinct and direct authority on the point and if indeed I were disposed to differ from the conclusion arrived at by the learned Judges, I should have, feeling bound by that decison, deemed it necessary to refer the consideration of the point to a Full Bench. For reasons however which I shall set out in the sequence I have arrived at the same conclusion as the learned Judges in that case and do not therefore find it necessary to make any such reference. This last case was referred to and followed with approval in the case of *Venkatachalam Chetty* v. *Aiyamperumal Tevan* (4). Mr. Justice Phillips who delivered the judgment of the Court in that case has expressly held that, though a claim for water taken by the tenant may be rent within clause (11) of S. 3 of the Estates Land Act, it is not for that reason alone an enhancement of rent.

Again in the case of *The Midnapore Zamindari Company, Ltd.* v. *Muthappudayan* (5), Sadasiva Aiyar and Spencer, JJ., held that the landlord is *prima facie* entitled to claim extra rent for second crop of paddy raised with landlord's water and the landlord's claim was not refused on the ground that the claim constituted an enhancement of rent under the Estates Land Act. The learned Judges there referred to all the earlier cases in which the same principle was recognized and applied.

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3. (1917) 33 M L J 355. 4. (1919) I L R 42 M 702 : 37 M L J 248.
5. (1920) I L R 44 M 534 : 40 M L J 213.

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"taken" appear in juxtaposition and must be construed as so appearing. Having regard to the context which is the amount payable by the tenant to the landholder for the use or occupation of the land, the water which is referred to as water supplied or taken can only refer to water belonging to the landholder and supplied by him to the tenant for purposes of cultivation or else taken by the tenant whether with or without the consent or knowledge of the landlord. It is impossible to construe the definition of rent as referring to anything except the relation between the landlord and tenant as such, and so construed it is clear that the water the payment for which is said to be included in the expression "rent" must be regarded only as water of the landholder used and enjoyed by the tenant. If it were not so, we must regard the legislature as having sought to legislate not only for determining matters between the landlord and tenant but also with respect to other matters, such as the contingency of the tenant using water of the Government in excess of his right as in this case. If such had been the intention of the legislature, there is no reason why in a section like S. 30 a provision was not included for enhancement of rent in such cases. Such a claim is obviously just and equitable and there is no reason why if the legislature regarded such claim as enhancement of rent it came to exclude it from the purview of S. 30. The conclusion therefore would be sound and reasonable that the legislature did not make any such provision in S. 30, because it did not construe any such amount as rent within the meaning of the definition. If therefore what is payable on account of water becomes rent only when water is that of the landholder, it follows necessarily that when the water used or enjoyed by the tenant is the water of the tenant himself or of some third party or even of the Government it may not be regarded as rent. Mr. Alladi Krishnaswami Aiyar for the appellants argued that, having regard to the usual provision in all enactments of definition, that the definitions given are to be taken only unless there is something repugnant in the subject or context, we should construe S. 24 and other sections of the Act as though there was something repugnant in the subject or context with regard to the claim in such cases being regarded as rent but such a contention cannot be accepted, and to my mind is unnecessary.

The learned Counsel for the respondent, Mr. Desikachari, argued that in the present case it must be held that the charge made by the Government for the water had been consolidated

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with the rent payable by the tenant to the landlord, in the language of the last part of the definition of rent in the Act.

I have some difficulty in seeing the relevancy and object of such an argument. If by that contention it was sought to take the claim from out of the definition of rent then it cannot help the respondent. If on the other hand it is sought to make out that the claim itself is not sustainable for other reasons we have nothing to do with it at the present stage. That would only be on the merits of the question. Both the lower courts in this case have concurred in dismissing the plaintiff's action on the preliminary ground that the claim amounts to enhancement of rent and that therefore it is not sustainable as the action is not one for enhancement as provided in the Act.

In the view I have taken it is not difficult to explain how many learned Judges of this Court came to give expression to the view, even without any elaborate discussion, that a claim of the kind could not possibly be regarded as constituting an enhancement of rent.

Curgenven, J.

Curgenven, J.—The appellants, who are Shrotriyamdars of Kadapperi, Madurantakam Taluk, brought a number of suits under S. 56 of the Madras Estates Land Act (I of 1908) to enforce acceptance of pattas. These Second Appeals are against concurrent judgments of dismissal passed, respectively, by the Sub-Collector of Chingleput and, on appeal, by the District Judge of Chingleput.

The question which arises for our decision is whether the stipulation contained in paragraph 2 of the tendered patta (Exhibit B) constitutes an enhancement of rent; because if it constitutes an enhancement the landholder can only enforce it, if at all, by a suit under S. 30 of the Act. The ryots in occupation of the suit lands have admittedly been cultivating them for an unspecified number of years with wet crops irrigated with water from the Madurantakam tank, which is a Government source. Previously no water-cess was levied in respect of this irrigation, but some years ago the Government located the mamool wet, and, finding these lands to be not included in it, began to collect water-cess from the landholder at the rate of Rs. 4 for the first crop, Rs. 2 for the second crop and Rs. 2 for the third crop. The landholder now seeks, under the terms of these tendered pattas, to recover corresponding charges from the defendant ryots.

Mr. A. Krishnaswami Aiyar, for the appellants, concedes that a charge for water, when made, as here, by a landholder

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in addition to the ordinary dry rent, is "rent" within the definition of that term contained in S. 3 (11) of the Act; because it is something "payable on account of the use and enjoyment of water supplied or taken for cultivation of land." He contends however that it is not "rent", nor, if "rent", is it an "enhancement", within the meaning of S. 30. It is not "rent", he says, because the section opens with the words "where *for any land* in his holding a ryot pays a money-rent...........", which limit the meaning of "rent" to its ordinary sense, that is, to quote again from the definition given in the Act, something payable to a landholder "for the use or occupation of land in his estate for the purpose of agriculture." I do not think that the words "for any land" in S. 30 mean anything more than "in respect of any land," and it may reasonably be said that the ryot pays water-cess 'in respect of his land' in the sense that it is due for water used upon his holding. But any weight which this argument might otherwise carry it loses when we consider the terms of ground No. (iii) of S. 30 upon which a suit for enhancement may be brought. It is thereby provided that if the Government execute a work of irrigation and the landholder has in consequence been required to pay in respect of a holding an additional revenue or rate, he may sue to enhance his ryots' rent; and this is clearly an instance where the enhancement would take the form of an added water-cess. To hold therefore that water-cess is not 'rent' within the meaning of the section would entail the consequence that ground No. (iii) is in fact no valid ground at all.

We have then to consider whether the addition of such a charge is an 'enhancement.' The argument addressed to us proceeds upon the assumption that that term is only applicable where the rate of rent is increased without any corresponding increase in the profit or productivity of the land. Some support for this view is obtained from *Battina Appanna* v. *Raja Yarlagadda* (3), where the learned Judges say, "We do not think that an extra payment due for additional advantage is necessarily an enhancement . . . We do not think that clauses (2), (3) and (4) of S. 30 have any application. They contemplate the continuance of the old state of affairs and yet a claim is made for increased rent without offering any fresh advantage." I find myself unable to reconcile this observation with the terms of the clauses themselves, because it seems to me that each contemplates an increase in the productivity of the land,

3. (1917) 33 M. L. J. 355.

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No. (ii) by reason of an improvement effected by or at the expense of the landholder, No. (iii) by reason of irrigation from a Government source, and No. (iv) by reason of fluvial action. I must conclude accordingly, upon a construction of the section, that an increase in the rate of rent occasioned by an increase in productivity is an "enhancement" and can only be enforced by suit.

It remains for consideration whether this view, based solely upon the terms of the Act, is discountenanced by any decided cases. It follows from the line of argument I have employed that cases decided under Madras Act VIII of 1865 do not necessarily afford any assistance. In *Kottaswamy* v. *Sandama Naik* (6), however, where a Zamindar sued to compel his tenants to accept a patta at an increased rate of rent, on the ground that he had by repairing a tank rendered a dry land cultivable with a wet crop, it was held that it constituted an enhancement which under clause (4) of S. 11 of the Act required the Collector's sanction. This case at least furnishes some authority for the meaning of "enhancement" which I have sought to gather from the terms of the present Act. The decision went the other way in *Vaythenatha Sastrial* v. *Sami Pandithar* (7) apparently on the ground that there had not been any money-assessment fixed upon the field. This case was followed in *Thayammal* v. *Muttia* (8) and again in *Venkata Rao* v. *Vaithilinga Udayan* (9). Both were cases of the use by the ryot of the Zamindar's water for irrigating his dry land and I imagine that if the learned Judges had been dealing with the terms of S. 30 of the present Act they would have decided them differently. There are the two cases in which the landholder sued, not in the Revenue Court for acceptance of patta, but in the Civil Court to recover from the tenant the amount of water-cess levied from him by the Government. [*The Raja of Venkatagiri* v. *Vudutha Subbarayudu* (1) and *Surya Rao* v. *Seetharamayya* (2)]. These cases were decided under S. 70 of the Contract Act, and, as pointed out in the latter of them, no dispute as to the rate of rent was involved. In *Batchu Raju* v. *Raja Rao* (10) it was taken to be settled law that "if the Zamindar wants to enhance the rent in consequence of any increase in the produce by water

1. (1907) I L R 30 M 277 : 17 M L J 145
2. (1910) 8 M L T 363.
6. (1870) 5 M H C R 294.
7. (1881) I L R 3 M 116.
8. (1887) I L R 10 M 292.
9. (1901) 12 M L J 22.
10. (1911) 21 M L J 1031.

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supplied from any Government source, he must previously obtain the sanction of the Collector under the Rent Recovery Act," a proposition which, if true then, has assuredly not become untrue by the enactment of Madras Act I of 1908.

I have passed these cases in brief review because the only difficulty which, in my view, arises in this case is caused by two decisions dating from after the introduction of the Madras Estates Land Act—*Venkatachalam Chetty* v. *Aiyamperumal Tevan* (4) and *The Midnapore Zamindari Company, Ltd.* v. *Muthappudayan* (5). Both were cases in which the landlord claimed to charge an additional rate for wet cultivation carried out with the use of his own water. In the former the suits were for rent, and it was contended that the charge was illegal, being an enhancement of rent. The learned Judge who delivered the judgment of the Bench held, on the authority of *Thayammal* v. *Muttia* (8), *Venkata Rao* v. *Vaithilinga Udayan* (9) and *Battina Appanna* v. *Raja Yarlagadda* (3), that a charge for water taken by the tenant is not enhancement of rent, adding, "no doubt under S. 3 (11)" of the Estates Land Act such charge, even if not consolidated with the rent, will come within the definition of "rent". But for that reason alone it is not necessary to hold that the charge for water in excess of the prior dry rent is an enhancement of rent. This is no doubt true: but if we go on to consider the language of S. 30, I am unable to resist the conclusion that any such addition to the rent is an enhancement within its meaning. If it be not so, why then is it an enhancement when the landholder makes an additional charge, as he may under clause (iii) of that section, in respect of dry land converted into wet by virtue of an irrigation work effected at his expense. The decision in *The Midnapore Zamindari Company, Ltd.* v. *Muthappudayan* (5) again is based upon three cases decided before the present Act came into force, and the precise terms of that Act, according to which the point must be settled, do not seem to have been brought to the attention of the learned Judges. In view of these terms, I must respectfully adhere to the opinion that clause (2) in the tendered patta would, if put into effect, occasion an enhancement of the rent.

I do not think that this conclusion is in any way affected

3. (1917) 33 M L J 355. 4. (1919) I L R 42 M 702 : 37 M L J 248.
5. (1920) I L R 44 M 534 · 40 M L J 213.
8. (1887) I L R 10 M 282. 9. (1901) 12 M L J 22.

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by two special considerations, (1) that the supply of water, from being unauthorized, will become authorized, and (2) that the additional charges payable may be conditional upon use of the water for the several crops. As to (1) we do not know enough of the circumstances to say that the water was previously, so to say, taken by stealth, and the fact remains that the ryot was getting *gratis* water that he is now charged for. As to (2), a conditional enhancement is still an enhancement, and it is probable that the defendants in these cases have practically no alternative but to use the water for their crops and, if the plaintiffs succeed in enforcing their claim, to pay the cesses for it. Mr. Krishnaswami Aiyar further objects that S. 30 makes no provision for enhancing the rent in such circumstances as the present, so that his clients, while compelled to pay the charges for water levied by the Government, will be unable to recover them from the ryots. I am not clear that clause (iii) of S. 30 will not apply to such a case. But I desire not to express any opinion upon that question, as I do not myself think that it ought to influence the decision upon the matter in issue, and lead us to say rather what should be in the Act than what is in it, where, in my view, there is no ambiguity. If considerations of this nature are to weigh, let it be remembered that to hold that a charge for water, made in the circumstances of this case, is not an enhancement of rent is to deprive the ryot of the protection of the Act in this respect; and it is not clear to me that, freed from this restraint, the landholder could not fix his own price for the water so supplied.

By the Court.—In view of the difference of opinion between ourselves with regard to the question of law in these Second Appeals and having regard to the importance of the question, the likelihood of its arising in exactly the same form fairly frequently and also to the decisions of some learned Judges of this Court referred to in our judgments, we are of the opinion that it is necessary and desirable that the following question should be referred to a Full Bench for its opinion:—

"Whether, when a ryot uses, for the cultivation of a land in his holding, water from a Government tank and for the use of such water so taken the Government recovers an amount as and by way of water-cess from the landholder, the claim of the landholder to recover such amount from the ryot is a claim for an enhancement of rent within the meaning of S. 24 of the Madras Estates Land Act."

K. V. Ramachandra Aiyar for *A. Krishnaswami Aiyar* for appellants.

K. Desikachari for respondents.

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Ramesam, J.

The Full Bench expressed the following

OPINION :—*Ramesam, J.*—The facts of these Second Appeals are as follows : The plaintiffs are Dharmakarthas of Sri Venkateswaraswami Temple in Kadapperi Village in Chingleput District, to which temple the suit village belongs as Shrotriem. There is no question in the case that the Shrotriem is not an estate. The litigation has proceeded on the footing that it is an estate. The suits were brought by the plaintiffs under S. 56 of the Estates Land Act for the acceptance of pattas and the execution of corresponding muchilikas. The pattas contain a new clause as compared with the former pattas. The additional clause runs thus :—

"Since for raising second or third crops on the single crop nanja land among the lands referred to in paragraph 1, and for raising first, second or third crops on the poramboke varappathu nanja lands, they have to be irrigated with the Madurantakam tank water, and since the Government charge the Shrotriem office, water-cess at the rate of Rs. 4 per acre for the first crop, Rs. 2 for the second crop and Rs. 2 for the third crop, you shall pay the amount of that water-cess together with merai, road-cess, etc."

The necessity for the insertion of this new clause in the suit pattas tendered for fasli 1331 arose thus : The suit lands have been irrigated for a long time by the water of the Madurantakam tank which is a source belonging to Government. In Srinivasa Aiyangar, J.'s referring judgment it is said :

"There has been not even a suggestion in this case of a work of irrigation or other improvement having been executed at the expense of Government. The Madurantakam tank is conceded to be an old tank."

But my brother Jackson, J., observed in the course of the argument that the tank was constructed by a Collector named Mr. Plaice. We must take it therefore that this was a work executed at the cost of the Government, but the Government charged no water rate up to fasli 1331. In or about that year the Government carried on a mamul wet survey, that is, a survey for the purpose of determining how much of the lands of suit village were entitled to water from the Government source free of water rate and if it is found that some lands are not entitled to water free of charge to take steps to impose water-cess under the Irrigation Cess Act, VII of 1865. The lands found to be entitled to water free of charge were presumably entitled to be so with reference to the engagement in the inam title deed. The result of the survey was that some of the lands in the village were found entitled to water right but others were not. In the case of those others the Government imposed water-cess at the rate of Rs. 4 for the first crop, Rs. 2 for the second crop and Rs. 2 for the third crop, and collected

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the amount from the landholders, the plaintiffs. The object of the new clause is to make the tenants liable to pay the amount of water-cess so collected from the landholders. It is not clear from the facts of the case in any of the judgments whether the mamul wet lands are localized; if they are not localized, there is some difficulty in the way of the landholders which it is unnecessary to discuss. But probably they are; at any rate, the case has proceeded on that footing. If they are localized, it is obvious that the landholder is entitled, if not to the whole, at least to a reasonable proportion of the new burden which has fallen on the land, and it is for the purpose of providing for some contribution by the tenants towards this burden that this clause is now inserted. The point referred to us is whether this therefore amounts to enhancement of rent within the meaning of S. 24 of the Act, but incidentally, the question arises, whether this adjustment on account of the imposition by the Government of water-cess cannot be made by way of amendment of a clause in the patta, but should be made by an application to the Collector under S. 30 of the Act for a reasonable enhancement of the rent. It is argued that these tenants' holdings are like the holdings of mamul wet tenants in the villages. Both contracted to pay the same rates from the beginning and if these tenants are made to pay more, it amounts to an enhancement of rent. But this argument involves a fallacy. The assumption with which it starts, namely, that these tenants' holdings are like the holdings of the mamul wet tenants, is not true. Such an impression has no doubt been created by the fact that for a number of years the Government allowed all the tenants to use the water of the tank indiscriminately and woke up to the need for a mamul survey only recently. But this is merely an accident. If the mamul survey has been made immediately after the tank was constructed, those holdings which are entitled to water free of charge would have so got them. But the others would not have got water without payment; so that though the nature of the land, the soil, crops and everything else may be similar, in respect of this matter they are not similar and the suit lands would have had to bear the burden of water-cess from the beginning. Whether all of it would have fallen on the tenant or not, or a reasonable distribution would have to be made, is another matter. That some portion at least of this should be borne by the tenant also there cannot be the smallest doubt. If the construction of the tank was followed immediately by mamul survey and rents were fixed, the rents imposed upon

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the tenants would have included some proporation of such water-cess collected from the landholder by Government, unless the water-cess is directly paid to Government by tenants. The fact that it took some time for the legal rights of the holdings to be determined and that they are determined now can make no change. It only shows that the landholder and the tenants contracted under a mutual mistake as to the nature of the land and under that mutual mistake they acted all these years. But on the discovery of the mistake, the proper rent in respect of the land is as I have indicated above. Thus, however much one may be inclined to say that such payment to the landholder to reimburse him in respect of the water-cess paid by him to Government is rent within the meaning of the definition of rent in the Act, it is certainly not an enhancement of rent within the meaning of Ss. 30 and 24. The rate of rent which I have described above is the proper rate of rent to be borne by the holdings from the time when the tank was constructed and the lands were cultivated as wet lands. In this respect I am unable to distinguish the present case from the decision in *Battina Appanna* v. *Sree-manthu Raja Yarlagadda Venkata Ramalinga Bahadur Zamindar Garu* (3). I may here observe that all the decisions under the Rent Recovery Act are not useful for discussion in the present case as the machinery provided in the two Acts is somewhat different. In the case just cited it was observed :

"We do not think that an extra payment due for additional advantage is necessarily an enhancement. Where *new* circumstances have come into existence which require *new* adjustment, there is no question of enhancement. I may observe that in this case there were no new circumstance or new enhancement. As I have already said, assuming that the lands were converted into wet lands soon after the tank was constructed and if the mamul survey had been then made, this is the rate which the lands would have been liable to pay from the very beginning. As to comparison with the rates of rent prior to the construction of the tank we have no means of such comparison because we have not got the pattas prior to that period.

The decisions in *Arunachallam Chettiar* v. *Mangalam* (11), *Venkatachalam Chetti* v. *Aiyamperumal Tevan* (4) and *The Midnapore Zamindari Company, Ltd.* v. *Muthappudayan* (5) show that the charging of additional rent when a certain contingency happens falls within the principle of *Battina Appanna* v. *Sree-manthu Raja Yarlagadda* (3) namely, when

3. (1917) 33 M L J 355. 4. (1919) I L R 42 M 702 : 37 M L J 248.
5. (1920) I L R 44 M 534 : 40 M L J 213.
11. (1915) I L R 40 M 640 : 31 M L J 168.

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circumstances require new adjustment and support the above conclusion. One observation I wish to make is that whether the view I have expressed is or is not correct, it is not an enhancement to which S. 30 of the Act would apply. S. 30 applies only to enhancements which might be regarded as permanent at the time of the application, that is, as continuously operating in the future as far as one can see until some new circumstances arise which require another enhancement or reduction, but not to cases where it is known the conditions may be constantly fluctuating.

In such a case there can be no permanent enhancement of rent, nor can there be a contingent decree for enhancement of rent. Such adjustment of rent to meet the fluctuating circumstances must therefore fall within the principle of *Battina Appanna* v. *Raja Yarlagadda* (3) if at all. If it does not so fall, the result would be that the landholder would be remediless and then there would be an urgent case for the interference of the legislature because a more inequitable circumstance from the point of view of the landholder cannot exist. For it must be remembered that the tenants are not bound to apply for water for any crop or for some of the crops and even if they always apply the Government is not bound to give. So long as this uncertainty exists there is no guarantee that we have come to a permanent state of things; and so long as the uncertain condition exists, the only way to meet it is to have a clause like the one in this case.

My reply to the question referred is in the negative.

Wallace, J.

Wallace, J. :—I think it essential, in this reference, to adhere strictly to the terms of the reference. The question referred presupposes that the landholder is endeavouring to surcharge on the tenant, in the name of 'rent', the exact amount of water-cess recovered from him by Government, for Government water taken by the tenant. Speaking for myself, I own considerable doubt, which is evidently shared by one of the learned referring Judges, whether such a claim by the landholder on the tenant is a claim for 'rent' as defined in the Madras Estates Land Act, and there is authority for this view in *The Rajah of Venkatagiri* v. *Vuduthu Subbarayudu* (1) and *Surya Row* v. *Seetharamayya* (2). The landholder is a mere collection agent for Government and it is difficult to see how what

1. (1907) I L R 30 M 277 : 17 M L J 145.
2. (1910) 8 M L J 363.
3. (1917) 33 M L J 355.

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does not really go into the landholder's pocket is rent. I do not regard S. 30 (iii) as standing in the way of this view. That section will permit the landholder to enhance the rent, *i. e.*, to increase the rate of rent which he has hitherto charged on the land as a *quid pro quo* for some improvement effected for the land, but that increase need not bear any necessary relation to the additional revenue which Government has imposed on the landholder. That section does not say that the rent shall be enhanced by the amount of that additional revenue. That imposition of the additional revenue is simply a necessary condition which will justify an increase of the rate of rent already being paid. S. 30 (iii) seems to me a variant of S. 30 (ii), *i.e.*, the improvement executed at the expense of Government is really executed at the expense of the landholder, because Government is charging him additional revenue therefor. If the landholder's claim then is not a claim for rent at all, it cannot be regarded as an enhancement of rent.

Assuming however that this claim is a claim for rent, I agree with my learned brother that it is not an enhancement of the existing rent, unless it is increasing the rates of rent as determined by the terms of the original contract, and that it is clear that the payment or apportionment of this new Government water charge was not present to the minds of the contracting parties at all when the rates of rent were fixed. In the case of a tenant who now uses Government water for the first time, I am satisfied that any additional charge made upon him by the landholder in consequence of a charge imposed on the landholder by Government for the use of this water would not be an enhancement of the existing rates of rent. It is an additional charge for additional facilities supplied to the land. That being so, I do not see how such a charge becomes an enhancement merely because there was an omission to charge it when the water was first taken. The original contract rights have not been interfered with or curtailed in any way. I do not wish to be understood as expressing any opinion whether the clause relating to this charge can be properly inserted in the patta or not. That is not part of the question referred to us and I prefer to express no opinion on that matter.

I answer the reference in the negative.

Jackson J.

Jackson, J. :—The question referred to us is in effect whether when a ryot takes water from a Government tank, and

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for the use of such water the landlord inserts in the patta an additional charge, such charge is an enhancement of rent as contemplated by the Estates Land Act.

Rent under S. 3 (11) of the Act includes whatever is payable on account of the use and enjoyment of water taken for cultivation of land. Therefore this charge for water would appear to be rent, and presumably the landlord would not have inserted it in his patta unless that were his opinion.

The question then remains whether such charge is an enhancement of rent. The parties had agreed that the tenant should enjoy his holding at a certain rate set forth in the patta, and when some amount is added to this sum already agreed upon, I think it can only be regarded as an enhancement of rent. It is very analogous to the enhancement mentioned under S. 30 (iii) "to enhance the rent on the ground that a work of irrigation has been executed at the expense of Government and the landlord has been lawfully required to pay in respect of the holding an additional revenue or rate to Government in consequence thereof."

That the enhancement may vary from year to year or even not be imposed at all, does not to my mind, make it any the less an enhancement. A proper patta should contain the full rate that may legally be imposed, though it may happen that the landlord is in some years entitled to less if certain conditions are unfulfilled. If in some year the ryot has not taken the water, the landlord may not be justified in charging for it; but when he is is so justified, his charging the full rate will be tantamount to an enhancement of the lawful rent if the patta does not already contain the maximum rate as one of its possible charges. It cannot, I think, be said that the lawful rent only comprises such items as are constant, and independent of circumstance, and any additional charge made owing to increased facilities enjoyed in any one year is no enhancement of rent. That would seem to be contrary to the intention of S. 30.

In *The Manager to the Lessees of the Sivasankara Zamindary* v. *Chidambaram Chetti* (12) it was held that if the rent was enhanced according to a clause already embodied in the patta providing that additional rent would be paid for increased area, then there would be no need for the landlord to invoke the aid of S. 42 (1) (*a*) or for the Collector to settle the dispute under S. 42 (2).

12. (1913) I L R 38 M 524.

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Following that principle it was held in *Battina Appanna* v. *Raja Yarlagadda* (3) that, where new circumstances have come into existence which require new adjustments, there is no question of enhancement. The idea would seem to be that if the patta already contains a proviso that, if certain circumstances come into existence the rent may be newly adjusted, then such adjustment is no enhancement. But what if the patta contain no such proviso? Is it to be said, for instance, that, where the patta merely contains a dry rate, the landlord may add as a proper insertion an enhancement by way of wet rate because such new adjustment is owing to new circumstances having come into existence. That interpretation appears to me to run entirely counter to Chapter III and the whole spirit of the Act. But this is the case followed in *Venkatachallam Chetty* v. *Aiyam Perumal Tevan* (4) (besides cases under the old Act of which the wording is different). The landlord was claiming as rent a charge for water taken to dry lands which had been let to the tenant on dry rates with no provision in the patta for any additional charge if water was taken. It was held that such a charge was rent within the terms of S. 3 (11) and that it was a charge in excess of the prior dry rent; but nevertheless it was not an enhancement. I do not follow this reasoning. It may be, as observed lower down, a reasonable and equitable charge but none the less it is an enhancement. Suppose that the tenant has a dry holding and the landlord, after constructing a tank, proceeds to charge additional rent because the productive powers of the land have been increased, is it to be said that this is no enhancement of the rent; and if it is no enhancement why is the landlord forced to sue in such circumstances under Chapter III of the Act? But if it be conceded that this would be an enhancement, is it not equally an enhancement if the tenant of the dry land takes water from a tank previously constructed and is charged an additional rent on that account. This is the difficulty which was present to the mind of my learned brother, Curgenven, J., and I confess to feeling its force. *The Midnapore Zemindary Company, Ltd.* v. *Muthappudayan* (5) is to the effect that if the previous patta contains an implied contract that a charge for water shall be levied according to custom, the explicit statement of that

3. (1917) 33 M L J 355.
4. (1919) I L R 42 M 702 : 37 M L J 248.
5. (1920) I L R 44 M 534 : 40 M L J 213

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contract in the patta, is no enhancement. That hardly bears upon the present question, for no such implied custom is set up.

I entirely agree that the rent of the previous pattas would have been higher if from the first it had been understood that the tenant was taking water for the use of which the Government would charge the landlord. But, if, when that mistake is discovered, the landlord attempts to increase the rent, it appears to me to be a clear enhancement though a justifiable enhancement. The old rate may not have been the proper rate; but the proper rate is only reached by way of enhancement.

I would therefore answer the question referred to us in the affirmative.

A. S. . *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

M. K. Sowbagiammal and another ... *Plaintiffs**

v.

Komalangi Ammal by guardian Kandaswami Chetti and another ... *Defendants.*

Sowbagiammal v Komalangi Ammal.

Probate and Administration Act, S. 70—Probate of will—Caveat—Interest necessary to support—Tests—Creditor of testator—Right to contest the will—Function of the Probate Court—Decision of questions of title.

In dealing with the question whether the caveator has the necessary interest to support the caveat, the test is whether the grant (under the will) displaces any right to which the caveator would otherwise be entitled. If so, he has such an interest; if not, he has not.

Where the interest alleged on behalf of a caveator is that the testator purported to dispose of by the will the stridhanam jewels belonging to the caveator as if they belonged to himself, the interest is not such as to support a caveat.

A creditor of the testator has no right to contest the will for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator or an heir.

The function of the Court of Probate is to decide whether the will propounded is the last will of the testator and whether the right to represent the estate may be conferred upon th eapplicant. The Court of Probate does not profess to decide th disputed title to every item of property mentioned in the will.

Case-law reviewed.

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*T. O. S. No. 13 of 1927. 16th January, 1928.

V. Radhakrishnayya and *A. Kuppuswami Aiyar* for plaintiffs

P. Venkataramana Rao and *B. C. Seshachella Aiyar* for defendants.

The Court delivered the following

JUDGMENT :—The question that has been raised I regard to be a settled point—settled alike by weighty decisions and unbroken practice of the Court. But of late, I have found a tendency at the bar to raise this point, as if it is a debatable one and requires serious notice. I am delivering this considered judgment, to once for all state definitely what my view is and I am tempted to follow this course in this case on account of the lengthy argument addressed to me.

One Mangadi Ellappa Chetti died leaveing assets valued by the petitioners at about 10 lakhs. He is said to have left a will and this is an application for probate of that will. The following pedigree serves to explain the facts of the case.

Mangadi Ellappa Chetti-testator Died July 1927 (left no widow)
| Kanniappa Chetti (Died 1922) M. Sowbagiamma Executrix & 1st petitioner.
|| Gopala Chetti (minor)
|| M. Komalangi (1st Caveator)
|| Chengalroya Chetti (minor)

Subbaroya
| M. S. Chengalroya Chetti (2nd Caveator)

The will is propounded by Sowbagiamma shown in the pedigree and her brother Thangavelu Chetti, these two persons being the executors named in the will. Caveats have been filed as shown in the pedigree by Komalangi and Chengalroya. The caveat of the latter may be summarily dismissed as he has not complied with the rules of the Court and has not cared to appear at the hearing. The former is a minor and is represented in these proceedings by her father. The petitioners take a preliminary objection, namely, that Komalangi does not possess such an interest as to support a caveat. The question I have to decide is, does she possess a sufficient interest and can she be heard as a caveator?

The interest alleged on her behalf is, that the testator purported to dispose of, by the will, her stridhanam jewels, as if they belonged to himself. I am asked to go into the question of the ownership of these jewels and declare, by my judgment,

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that the deceased was not the owner and that his will in regard to them is inoperative. Two things I regard to be clearly settled by authority, firstly, that the interest alleged is not an interest as would support a caveat, secondly, that a Probate Court does not decide questions of title in regard to the property disposed of by the will.

The question may be thus shortly stated. The testator has disposed of property belonging to the objector. By reason of this fact, does the latter get an interest to oppose the grant of probate? One of the earliest cases, and one often cited, is *Behary Lal* v. *Juggo Mohan* (1). In that case, the grant of probate was opposed on the ground that the testatrix who was a Hindu widow had only a life-interest and that her husband's property passed by survivorship to the latter's brother, the caveator. The District Judge refused the application for probate, holding that the widow had no power to dispose of the properties mentioned in the will. Garth, C. J., and McDonald, J., held

> "that upon an application for probate of a will, as long as it is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose."

The learned Judges add that the grant of probate does not confer upon the executor any title to property, which the testatrix had no right to dispose of, but that it only perfects the representative title of the executor to the property which belonged to the testatrix and over which she had a disposing power.

This case has been repeatedly followed in Calcutta; but I shall content myself with referring to two more decisions of that court. In *Abhiram Dass* v. *Gopal Dass* (2) the caveator objected that the testator never owned the property with which the will dealt as the same belonged to a Mutt, to which the testator and the caveator belonged. The learned Judges, reversing the order of the lower court, held that a person, disputing the right of a testator to deal with property as his own, cannot be properly regarded as having an interest in the estate of the deceased. The second case is *Srigobind Pershad* v. *Musstt. Laljhari* (3). Letters of administration had been granted to a Hindu lady and the application was for revoking those letters inasmuch as the property was joint family property

1. (1878) I L R 4 C 1.
2. (1889) I L R 17 C 49.
3. (1909) 14 C W N 119.

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which passed to the petitioner by survivorship. On the ground that the interest to be shown in an application for revocation is the same as the interest to be possessed by a person opposing the grant, the court came to the conclusion that the applicant did not have sufficient interest and his application was accordingly rejected.

Now turning to Bombay, the law is very clearly stated in *Bal Gangadhar Tilak* v. *Sakwarbai* (4). That was also a case of revocation of a grant already made, but the learned Judges point out that in this respect the same considerations apply to a revocation of a grant as to a grant itself. The law is thus stated :

"We regard the grant of probate as decisive only of the genuineness of the will propounded and the right of the executors thereby appointed to represent the estate of the tesattor. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property."

It will be sufficient to refer to one other case of the Bombay High Court, *Haridas* v. *Nanabai* (5). In that case, the grant was opposed on the ground that the property dealt with by the testator was joint family property which could not be disposed of by his will. The trial Judge, Russel, J., dismissed the caveat, holding that the defendant had no interest and adding, that, were he to decide differently, he should do so contrary to a long series of cases. The case was taken in appeal and this view was confirmed. Jenkins, C. J., observes that this was the view that was uniformly taken in Bombay, Calcutta and Allahabad. On enquiry from the Testamentary Registrar, the learned Judges found that this was the invariable practice on the Original Side of the Calcutta High Court. I regard this as a very valuable case and I may cite an important observation from that judgment :

"The grant in no way hurts or prejudices the caveator, for it is general in its terms, specifying no item of property and prejudging nothing to the detriment of the appellant."

As regards the Allahabad High Court, I may refer to *Birj Nath Dee* v. *Chandar Mohan Banerji* (6). In that case again, it was objected that the widow had no disposing power over the property or some of it dealt with by the will. Edge, C. J., and Blair, J., observe that it is not the practice of the Courts in India to try questions of title and finally decide them

4. (1902) I L R 26 B 792. 5. (1904) I L R 28 B 644.
6. (1897) I L R 19 A 458.

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on applications for grant of probate or letters of administration. This was the view taken, in spite of the fact, that at the bar reliance was placed upon *Tharp* v. *Macdonald* (7) to which the learned Judges also refer in their judgment.

Coming to our own High Court, *Rahamtullah* v. *Rama Rao* (8) (decided by Muthuswami Aiyar and Best, JJ.,) contains some useful observations. The question arose, whether a creditor of the testator can be said to have an interest in the latter's estate. The answer was in the negative. Discussing the nature of the interest which a caveator must possess, the learned Judges say :

> "There must be a possibility of having an interest in the result of setting aside the will."

A creditor of the testator, they observe, has no right to contest the will, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator, (I may add) or an heir. In my own experience, I am not aware of a single case, during the last 25 years, when any Judge, sitting on the Original Side of this Court, allowed a question of this kind to be raised in a testamentary proceeding. This is confirmed not only by Mr. Radhakrishnayya who appears for the petitioners but by Mr. Venkatramana Rao himself who represents the caveator.

The view I am taking is thus supported by authority and uniform practice of the court; furthermore, it is based on reason and sound common sense. The function of the Court of Probate is to decide whether the will propounded is the last will of the testator and whether the right to represent the estate may be conferred upon the applicant. The Court of Probate does not profess to decide the disputed title to every item of property mentioned in the will. If a testator disposes of, say, 15 items of property and 10 different claimants appear before the court, each claiming one of them as his own, is the court to postpone its decision on the validity of the will and on the representative character of the applicant, until it decides the disputed ownership of the various items? By delaying the grant, serious injury may be caused to the estate, there being none during this interval to represent it. Then, again, innumerable persons, each with his grievance, may come to oppose the grant, from one who claims a property worth some lakhs, down to one who sets up title to a property worth

7. (1878) L R 3 P D 76. 8. (1894) I L R 17 M 373.

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a paltry sum. It is certainly not to be expected that the application is to be decided in the presence of each one of these claimants. If, then, the scope of a testamentary proceeding is correctly understood, no difficulty can arise. Can the executor to whom probate is granted, on the strength of that probate, recover property which is not the testator's? Does the probate confer on the executor right to property to which he is otherwise not entitled? If it is remembered that these questions ought to be answered in the negative, it does not in the least matter, what the properties are, which the testator professes to treat as his own and to dispose of by his will. The remarks I have made apply equally to applications for letters of administration. In dealing with the question—Has the caveator the necessary interest?—the test is, does the grant displace any right to which the caveator would otherwise be entitled? If so, he has such an interest, if not, he has not. An heir on intestacy has an interest in impeaching the will; for, but for the will, he would succeed to the property. A legatee under a previous will has a similar interest; for, he is interested in establishing the validity of that will and impeaching the validity of the later will which deprives him of the benefit. A reversionary heir under the Hindu Law has such an interest; for, normally, a widow has only a limited estate and the reversioner is interested in impeaching a will, which professes to enlarge that interest, or, again, which purports to confer upon her a right to make an adoption. [See *Brindaban Chandra Saha* v. *Sureswar Saha* (9)]. But in every case it must be shown that the caveator, but for the will, would be entitled to a right, of which that will deprives him.

I have said there has been of late a tendency at the bar, to treat the rule I have stated as open to question, and support is sought in certain observations of a Bench of this Court in a recent case, *Hanumantha Rao* v. *Lakshmamma* (10); but I am sure I shall not be wrong if I assert (and I do so with some confidence) that the learned Judges could not have intended by their dicta to cast a doubt on a long settled practice sanctioned in a series of judgments of great authority.

In this case, I have come to the conclusion that the caveator is not possessed of an interest entitling him to oppose the grant and I dismiss his caveat with costs which I fix at Rs. 300.

9. (1909) 10 C L J 263. 10. (1926) I L R 49 M 960 : 51 M L J 563.

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It came to my notice that citation did not issue to the minor grandsons of the testator, Gopala and Chengalroya. They are certainly persons interested in the estate and I therefore directed citation to issue to them. As their mother happens to be one of the petitioners, a Court guardian has been appointed and the latter has filed a written statement. I shall now proceed to hear the application on its merits.

Mr. Venkatramana Rao now says that his client, the caveator, has another kind of interest. According to him, if there is a bare possibility of a person having an interest, that person is entitled to file a caveat. It is needless in this case to enquire whether this proposition is sound or not; the caveator is the wife of Gopala Chetti, the minor grandson of the testator, and whatever interest she may or may not have, she cannot be permitted to oppose the grant, when we find that as a matter of fact, her husband and her brother-in-law, who alone would be entitled to succeed on intestacy, are before the Court and are taking necessary steps. The contention is overruled and I direct the plaintiffs to examine their witnesses.

N. S. *Caveat dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Ceylon.]

PRESENT :—VISCOUNT HALDANE, LORD SHAW, AND LORD WARRINGTON OF CLYFFE.

Andrahennedige Dinohamy and another ... *Appellants**

v.

Wijetunge Liyanapatabendige Balahamy and others ... *Respondents.*

P. C.

Dinohamy v. Balahamy

Marriage—Concubinage—Cohabitation as man and wife for a long period—Presumption of marriage.

There is a presumption in favour of marriage rather than of concubinage. Where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie,* (1881) L. R. 6 A. C. 364, followed. *De Thoren* v. *Attorney-General,* (1876) L. R. 1 A. C. 686, and the *Breadalbane Case,* (1867) L. R. 1 H. L. Sc. 182) referred to.

Where the parties constantly, continuously, and openly, lived and cohabited together for twenty years in the same house as husband and

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*P. C. Appeal No. 83 of 1926. 16th June, 1927.

wife, and had nine children, and were regarded and recognized as man and wife by their relations and friends and by all who knew them, and throughout their cohabitation they stood to each other in the relation of husband and wife, all the family functions and ceremonies being conducted on the footing alone that they were man and wife, *held*, that these facts (in the absence of any countervailing circumstances) afforded clear and conclusive evidence of marriage and the legitimacy of its offspring.

Appeal (No. 83 of 1926) from the Supreme Court of Ceylon.

L. De Gruyther and *K. Brown* for appellants.

H. I. P. Hallett for respondents.

The material facts are given in their Lordships' judgment, which was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal raising the question of the validity of a Singhalese marriage. A petition was presented by the respondents in the District Court of Tangalla in Ceylon for letters of administration of the estate of one, who for short may be called Don Andris de Silva. Don Andris died on the 1st September, 1921. The application was made, upon the 14th December of that year, by Singho Appu, the son-in-law of the deceased Don Andris. Don Andris died intestate.

The family history of Don Andris was that he had been regularly married in 1885, having as issue the daughter who, through her husband Singho Appu, now claims his whole estate. This first wife died in May, 1900.

Then in 1901, and for a course of twenty years until 1921, when Don Andris died, the proved family history was as follows:—

He married one, Balahamy, with the procession, the giving of gifts and other ceremonials familiar to the law of Ceylon. There was, however, one omission, namely, that the marrige was not registered, and in that sense the marriage was irregular. But registration, however important, was not by law essential. Don Andris and she lived together as apparently man and wife for these twenty years. During that period she bore him nine children, of whom eight are still alive. The father and mother and children all lived together as one family. At the time of his death she and the eight surviving children were living in the family house.

By the law of intestate succession in Ceylon, the estate of the deceased would have been divided, one half to his widow

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and the other half equally among the nine children, namely, her eight, and the respondent, the child of the first marriage.

The respondents claim that this law of succession operates. The appellants, however—Singho Appu and his wife—deny to the respondents any such right of succession. They maintain that Balahamy was not the wife of Don Andris, and that all her children were illegitimate. They accordingly claim that Dinohamy succeeded to the whole estate.

In the circumstances mentioned it is not to be wondered at that, when on the 14th December, 1921, letters of administration were granted to the appellant, Singho Appu, as son-in-law of the deceased and husband of Dinohamy the daughter by the first marriage, he considered it expedient to do something to fortify a claim to the estate. For the result of success in his application would be that the appellants would be able to disinherit and eject from the family home the first respondent and her eight children. A deed, purporting to be a deed of agreement, was accordingly prepared. It was made ready by the 18th December, namely, four days after letters of administration; and it was executed on the 23rd December.

It is sufficient to say of that deed that the estate was declared wholly to belong to the appellant Dinohamy, the daughter of the first marriage. A certain portion of the property, however—about one half—was to be given by her as a donation to the eight children; and the deed entirely disinherits their mother, who, as the widow of Don Andris, would have succeeded to the other half. It not only, however, does this, but it further states that Don Andris had "lived with the said ....Balahamy as his mistress and not having legally married her, eight children were born to them". She is accordingly, as stated, entirely disinherited by the alleged agreement.

There are only two real questions in the case :—

First, was Balahamy married according to the law of Ceylon to Don Andris?

Secondly, are her or her children's rights affected by the deed of agreement?

The strength of the appellants' case—there being a total conflict between the witnesses on the one side and those on the other—is that the District Judge believed the appellants' witnesses. On the other hand, the two Judges of the Supreme Court of Ceylon, by their judgment dated the 18th December, 1925,

reversed the District Court's judgment, and on both the points in issue differed from the learned Judge, disbelieved the witnesses of the appellants, and believed those of the respondents.

It is not disputed that according to the Roman Dutch law there is a presumption in favour of marriage rather than of concubinage; that according to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

A judgment substantially in these words [*Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1)] was pronounced by this Board through Sir Barnes Peacock. Sir Barnes discusses the law with some fullness quoting among other cases the opinion of Lord Cairns in *De Thoren* v. *Attorney-General* (2) and making reference to the Scotch leading case, the *Breadalbane case* (L. R. 2 H. L. Sc. 269)*.

Since the *Breadalbane case* (3) has been mentioned it may be expedient to note these sentences from the judgment of Lord Cranworth therein :—

"Marriage can only exist as a result of mutual agreement. The conduct of the parties, and of their friends and neighbours, in other words, habite and repute, may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that habite and repute in any case make the marriage. Repute can obviously have no such effect.

It is, perhaps, less inaccurate to speak of habite creating marriage if by the word 'habite' we are to understand the daily acts of persons living together, which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is, perhaps, one rather of words than of substance; but I prefer to say that habite and repute afford by the law of Scotland, as, indeed, of all countries, evidence of marriage, always strong, and in Scotland, unless met by counter evidence, generally conclusive."

*Owing to similarity of names, the reporters in 1 A. C. 686 and 6 A. C. 364 were misled in giving the wrong citation to the *Breadalbane Case*, and the error has crept into their Lordships' present judgment. The reference should be to L. R. 1 H. L. Sc. 182.—*K J. R.*

1. (1881) L R 6 A C 364. 2. (1876) L R 1 A C 686.
3. (1867) L R 1 H L Sc. 182.

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Whether this distinction be merely one of words rather than one of substance does not, in the present case, really arise; because in their Lordships' opinion the evidence in this case comes up to the full measure of what would be demanded either in England, or in Scotland, or Ceylon, namely, it is unanswerable and conclusive evidence.

The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognised, by affectionate provisions, his wife and children. The evidence of the Registrar of the District shows that for a long course of years the parties were recognised as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess—all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody.

The learned Judges of the Supreme Court have discussed the evidence carefully, and have come to these conclusions. The Board thinks they are right.

The second point has reference to the alleged deed of agreement. It has already been noted as remarkable that Singho Appu thought it right within a few days of letters of administration being granted to him to fortify his and his wife's position by getting an agreement of the kind. The facts with regard to it are that the widow gave no instructions for its preparation; that she was not consulted as to its provisions; that she obeyed a message to go to Singho Appu's house, and that she there, at his request, signed the deed. She had no legal adviser. The deed was in English, but she could not read English. She says that she understood that she was required to put her name to it because it concerned her half of the estate, but that she did not know anything else. It is almost beyond reason to expect that she would have knowingly signed a deed declaring that she herself had lived with Don Andris for twenty years as his mistress, and that all her children were illegitimate children.

The most careful examination of the conduct of the notary in such a case must be made. Its outstanding feature is that being instructed by one party to a transaction involving not only the extinction and alteration of patrimonial rights, but also

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a degrading alteration of the status and moral life of others who were to be made parties to the deed, he never seems to have suggested that it was a case for another notary being employed to protect the wife and children's interests. The transaction and the evidence by which it was supported are alike discreditable. It would require the very strongest evidence in such circumstances to prevent the respondents from being protected against such a transaction by a court of law. Their Lordships agree with the Supreme Court that it is not proved that the wife understood, or had sufficiently explained to her, this deed written in a foreign tongue, and think it is no bar to her and her children's rights under the Ceylon law of intestate succession.

Their Lordships do not enter further into the facts of the case as, for instance, the entries upon the register and other topics upon all of which topics the Board agrees with the Supreme Court.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors for appellants : *Freeman* and *Cooke.*

Solicitors for respondents : *O. A. Cayley.*

K. J. R. *Appeal dismissed.*

Reporter's Note .:—The Roman-Dutch law allows presumptive proof of marriage by evidence of cohabitation and repute. So likewise does the law of this country; *Indar Singh* v. *Thakar Singh,* (1921) I. L. R. 2 Lah. 207 (a case under the Hindu Law), where the authorities are collected; see also *Re Shephard, George* v. *Thyer,* (1904) 1 Ch. 456; *Mouji Lal* v. *Chandrabati Kumari,* (1911) L. R. 38 I. A. 122 : I. L. R. 38 Cal. 700 : 21 M. L. J 933 (P. C.) ; *Ghazanfar Ali* v. *Kaniz Fatima,* (1910) L. R. 37 I. A. 105 : I. L. R. 32 All. 345 : 20 M. L. J. 579 (P. C.), where however the presumption of marriage from prolonged cohabitation was rebutted, the alleged wife being a prositute before the cohabitation began. Compare *Ma Wun Di* v. *Makin,* (1907) L. R. 35 I. A. 41 : I. L. R. 35 Cal. 232 : 18 M L J 3 (P. C.), which Sir Hari Singh Gour in his "Hindu Code" treats as an *exceptional* case, where the general presumption of marriage arising from cohabitation with habit and repute, was not applied, and their Lordships counselled caution in its application to oriental people amongst whom open cohabitation without marriage was not so uncommon as in the Western countries.

PRIVY COUNCIL.

(On appeal from the Supreme Court of Nigeria).

PRESENT :—VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH AND LORD WARRINGTON OF CLYFFE.

Sunmonu ... *Appellant** (*Deft.*).

v.

Disu Raphael, since deceased (now respresented by Awanotu) ... *Respondent* (*Plff.*).

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Sunmonu v. Disu Raphael

Adverse possession—Exclusive possession by one member of the family for and on behalf of the family generally—Title under the Statute of Limitation.

Where under the substantive law governing the parties, there is no individual ownership in land, the title to which is vested in the family, and the head of the family for the time being is a *quasi*-trustee for the members thereof, no title to the land can be acquired under the Statute of Limitation by mere length of possession. The party in possession (that is, the head of the family) is, in contemplation of law, holding for and on behalf of the family, and not on his own sole account. On his death, if one of his sons gets into possession, he too must be deemed to have got in consistently with a rightful title, that is to say, on behalf of his brothers and sisters and the family generally. Exclusive possession by him does not, therefore, confer on him a title under the Statute of Limitation

Appeal (No. 30 of 1926) from the Supreme Court of Nigeria.

Bischoff and *C. M. T. Ioving* for appellant.

The respondent did not appear.

The material facts appear from their Lordships' judgment, which was delivered by

Viscount Haldane

Viscount Haldane :—The appeal before their Lordships comes from the Supreme Court of Nigeria, and that Court affirmed a judgment of Mr. Justice Pennington, sitting as Judge of the Divisional Court. The appeal is that of the defendant, and the defendant appeals on the ground that he was entitled to enforce his right to the property in question. The original respondent is dead and he is represented by Awanotu, a daughter, but she has not appeared on this appeal, whether from want of money or otherwise is not important. Anyhow those were the parties.

The claim was to land in Victoria Road at Lagos, and the claim was that of the plaintiff, who is called Disu Raphael, now deceased. Disu Raphael said that this was property

*P. C. Appeal No. 30 of 1926. 27th June, 1927.

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which belonged to the family, and he claimed a declaration that the property was the property of Sule Raphael, deceased, his father, and he claimed it for himself and for the rest of the family of Sule Raphael. The defendant, Sunmonu, was a half-brother of Disu Raphael. They were both sons of Sule Raphael but by different mothers. It was claimed at one time that Sule Raphael had made a Christian marriage in Brazil with a Christian woman, and that consequently, according to the law of Nigeria, his property went according to English law, so that his eldest son, Disu Raphael, would have been exclusively entitled. This, however, was not urged at the Bar, and could not have been successfully urged because both Courts concurred in finding that the Christain marraige was not established. There was, therefore, a native marriage, and, according to the native law the property which descended, that is the estate, went for the benefit of the family.

It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani* v. *The Secretary of Southern Nigeria*,(1) a decision of this Board. At page 404 in the judgment of the Board the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise, the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufrucutary right which extends *prima facie* to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification. The matter is very well stated in the report made by Chief Justice Rayner on Land Tenure in West Africa. It is a report made in 1898, and the passage to which reference is made is adopted by the Privy Council in the case of *Amodu Tijani* v.

1. (1921) L. R. 2 A. C. 399.

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Secretary of Southern Nigeria (1), which is called the White Cap case. Chief Justice Rayner says :—

"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the vilage or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family."

Their Lordships are aware that that was said of the title of the White Cap Chiefs. Their title was the question in that case, but the principle applies generally.

Sunmonu was sued in the way stated by Disu Raphael, and he pleaded possession, the Statute of Limitations, and also a purchase and the grant of the primary title to it. The history of the primary title is this : Before 1895, when Sule Raphael died, he had bought the land from Agebodeh, who had a Crown grant of it dated 1866, that is, he had a Crown certificate; he had no conveyance. It does not appear to have been usual in those days for the Crown to make grants; they granted a certificate of title. That was acquired by Sule Raphael from Agebodeh, and he took over the Crown document *at the death of Sule Raphael Summonu and other members of the family were in possession. Shortly afterwards the others departed, leaving Sunmonu in sole possession. In 1905 Sunmonu went and got a fresh primary title for himself. He surrendered the old one and got a new document comprising the land in question and additional land.

Now various things were set up. Sunmonu said he had purchased from his mother, the widow of Sule Raphael; but the Courts below agreed in pointing out that the lady could have no right to sell, and that, more than that, the land officer of the Crown, the Commissioner, would have had no power to grant a new title which varied or superseded the old one,

*There appears to be an error in punctuation here. The passage should read thus : "That was acquired by Sule Raphael from Agebodeh, and he took over the Crown document. At the death of Sule Raphael, Sunmonu and other members of the family were in possession".—K. J R

1. (1921) L R 2 A C 399.

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and the new grant must therefore be regarded as made to Sunmonu on behalf of the family, and they also said that there was no evidence of acquiescence in exclusive occupation by Sunmonu to the exclusion of the other members of the family. The usufruct remained right through, whether they exercised it or whether they did not, and it was quite usual for somebody to be in possession as trustee for his family, and, therefore, his occupation was in contemplation of their right.

The Courts agreed in finding the facts as stated, and what they say is well expressed in the concluding paragraph of the judgment of Chief Justice Van der Meulen. The result is that Sunmonu must be taken to have got in consistently with a native title and to have got in on behalf of his brother and sisters and the family generally.

In that state of things no Statute of Limitations could render any assistance to the appellant; there is no evidence about acquiescence, and the result is that their Lordships do not feel themselves able to disturb the judgments of the Court below, which are unanimous.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared there will be no order as to costs.

Solicitors for appellant : *Lawrence, Jones & Co.*

Solicitors for respondent : *Ex parte.*

K. J. R. *Appeal dismissed.*

Reporter's Note :—This decision follows the principle recognized in such cases as *Corea* v. *Appuhamy* : L R 1912 A. C. 230 (an appeal from Ceylon) and (1918) 20 Bom. L R 1064, (P C.) (*Hardit Singh* v. *Gurmukh Singh* : an appeal from the Punjab Chief Court), namely, that "possession is never considered adverse if it can be referred to a lawful title" —*K J R*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioners of the Central Provinces.]

PRESENT :—LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

Martand Rao ... *Appellant** (*Deft.*).

v.

Malhar Rao . *Respondent* (*Plff.*).

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Martand Rao
v.
Malhar Rao.

Impartible estate—Amgaon Zamindari (Central Provinces)—Onus of proof—Special custom modifying ordinary law of succession—"Raj"—Value of "opinions" in official reports.

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*P. C. Appeal No. 10 of 1926. 24th November, 1927.

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Although official reports are valuable and in many cases the best evidence of *facts* stated therein, *opinions* therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be.

A special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence; (Observations of Lord Justice James in *Umrithnath Chowdhry* v. *Goureenath Chowdhry* : (1870) 13 Moore I. A. 542, at p. 549, relied on.)

Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

If an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.

The word '*raj*' by itself does not necessarily imply impartibility.

Unless considerable age can be ascribed to any particular *Zamindari*, of whichever class it may be, it cannot claim to be governed by either *ancient* or *invariable* custom.

Neither by the terms of the grant, nor by territorial or family custom, any more than by its inherent nature, can the *Zamindari* of Amgaon (in the Central Provinces) be considered an impartible estate.

History of the *Zamindari* tenure in the Central Provinces, discussed.

Judgment of the Judicial Commissioners reversed.

Appeal (No. 10 of 1926) from a judgment and decree, dated the 23rd February, 1923, of the Court of the Judicial Commissioners of the Central Provinces (Batten, J. C., and Hallifax, A. J. C.), reversing the judgment, dated the 1st March, 1920, of the District Judge of Bhandara.

The material facts are given in their Lordships' Judgment, and also in the report of the case in the Court below; (see *Malhar Rao* v. *Martand Rao* (1923) N. L. J. 189).

The main question for determination on the appeal to His Majesty in Council was whether the *Zamindari* of Amgaon was impartible or partible. The District Judge decided that the *Zamindari* was partible, but on appeal the Judicial Commissioners held that it was impartible and made a decree declaring that the respondent, who was the plaintiff in the suit, was sole-

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ly entitled thereto. They concluded their judgment in the following words :—

"The Amgaon *Zamindari* before the Thirty Years' Settlement was of the nature of a *'raj'*, and, therefore, impartible and subject to the rule of single succession, the other members of the family of the *Zamindar* of the moment being entitled to a suitable maintenance and not to any specific share in the income (*Baijnath Prasad Singh* v. *Tej Bali Singh* (1921) L. R. 48 I. A. 195 : I. L. R. 43 All. 228 : 40 M. L. J. 387 (P. C.). It was an estate of an exactly similar character that was conferred by Government on the *Zamindar* at the Tirty Years' Settlement (*Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* : (1899) L R 27 I A 39 : I L R 27 Cal. 515 (P C). In addition a custom had by that time grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those condiions. Nohing occurred at the Thirty Years' Settlement or has occurred since to alter the nature of the grant or to affect the validity of the family custom (*Rao Kishore Singh* v. *Must. Gahenabai* : (1919) 15 Nag. L Rep. 176 (P. C.)".

Lowndes, K. C., Parikh and *P. A. Pandit* for appellant.

De Gruyther, K. C., Dube and *N. B. Niyogi* for respondent.

Their Lordships' judgment was delivered by

Lord Sinha.

Lord Sinha :—This is an appeal against a judgment and decree, dated the 23rd February 1923, of the Court of the Judicial Commissioners, Central Provinces, reversing a judgment and decree, dated the 1st March, 1920, of the Court of the District Judge, Bhandara.

The suit in which the said decrees were made was brought by the plaintiff, Malhar Rao, against his younger brother, Martand Rao, claiming that, on the death of their father, Madho Rao, he alone was entitled to succeed to the Amgaon Estate, situate in the Bhandara District of the Central Provinces, to the exclusion of his younger brother, on the allegation that by the terms of the grant under which the estate was held, and by a family custom and also by a territorial custom, the said estate was impartible and succession thereto was governed by the rule of lineal primogeniture, and that the younger brother was entitled to suitable maintenance only and not to any specific share in the estate.

The pedigree of the family from its founder, Kolhu Kunbi, including the Amgaon branch (under Pandoo) and the other branches, is given below :—

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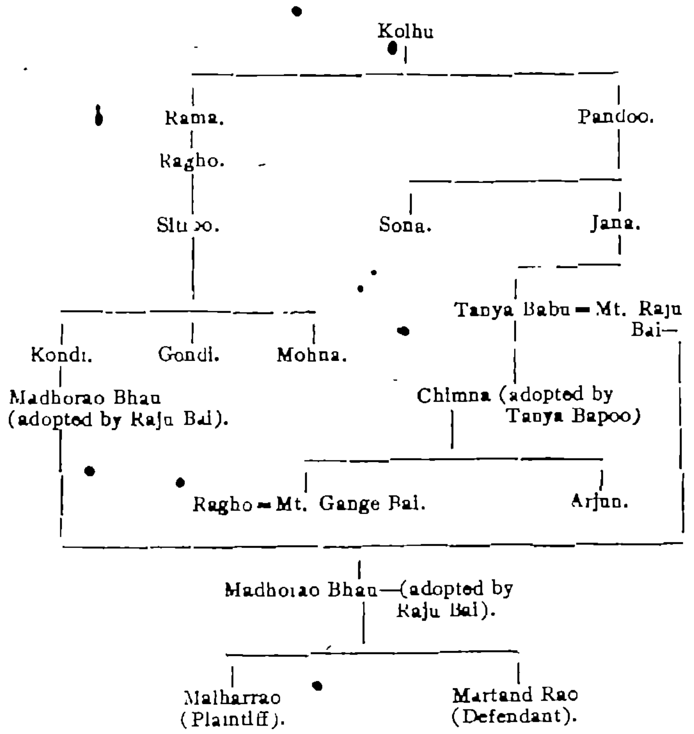

Seventeen issues were framed by the Trial Court, of which the following four only are material at this stage, *viz.*, Issues Nos. 1, 2, 9 and 10 :—

(1) Was the Zamindari of Amgaon conferred on Pandoo by the Bhonsla Raja subject to the condition that it was to be impartible and to devolve on the eldest son, females having no right of succession, as alleged by the plaintiff, or was it conferred on Sonba (or Sona) without any condition being attached to the grant as alleged by the defendant?

(2) In the time of the Bhonsla Raj, whenever a Zamindari was granted, did the grant always carry with it the conditions mentioned in paragraph 5 of the plaint (*i.e.*, impartibility and single successon)-and also the incident of inalienability?

(9) Was devolution to Zamindari property governed by the rule of primogeniture in the family of Pandoo and Kolhu; if so, are the parties bound by the said custom?

(10) Is there a territorial custom to the effect that Zamindari property is impartible, inalienable and devolves by the rule of primogeniture as alleged by the plaintiff; if so, are the parties bound by the said custom?

After having considered the evidence minutely and elaborately on each of these issues, the District Judge held in favour of the defendant on all the four issues and dismissed the plaintiff's suit with costs. On appeal, the method adopted by the Appellate Court was different.

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As their Lordships understand the judgment of the Judicial Commissioners, they accepted as conclusive the opinion which they considered to have been expressed in certain official reports of great authority that the estate in question was in the nature of a *raj*, and they then proceeded to consider whether the evidence adduced in the case in any way displaced that opinion. This is an inconvenient, if not an erroneous, method, and their Lordships consider it necessary at the outset to point out that, though such official Reports are valuable and in many cases the best evidence of *facts* stated therein, *opinions* therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such Reports may be.

There are certain propositions of law by reference to which this case must be decided, and their Lordships consider that they can all be taken as well settled.

(*a*) When there is a dispute with respect to an estate being impartible or otherwise, the *onus* lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(*b*) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of Lord Justice James in the case of *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1) :—

"The custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back."

(*c*) That if an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.

1. (1870) 13 M I A 542, at p. 549.

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As regards the first issue, the District Judge came to the conclusion that the estate of Amgaon was granted by the Bhonsla or Maharatta Government of Nagpur in favour of one Sonba (or Sona) without any condition attached to it as regards devolution.

On the second issue he found that the plaintiff had adduced no evidence in support of his allegation that in the time of the Bhonsla Raj, whenever a Zamindari was granted, the grant always carried with it the condition of succession by lineal primogeniture and inalienability. He accordingly found against the defendant on both the first and second issue.

On the ninth issue, the plaintiff's case was that, in the Amgaon family itself, taking either Pandoo or Sonba to be the original grantee, there was a custom of succession by lineal primogeniture which had grown up, having been derived from the parent stock of the Kampta Zamindari, which started with one Kolhu, father of Pandoo and grandfather of Sonba, other descendants of whom came to be proprietors of two other Zamindaris, viz., Palkhera and Kirnapur, where the same custom also prevailed. The District Judge held that the family custom relied upon by the plaintiff had not been proved.

On the tenth issue, the District Judge's conclusion, after an exhaustive survey of the evidence in regard to territorial custom as set up by the plaintiff, was summarised in paragraph 92 of his judgment as follows:—

"The above is all the evidence in regard to territorial custom as set up by the plaintiff. It shows that a number of Zamindaris, viz, Bijli, Chichwada, Gangazeri, Jambhli, Palkhera, Nausari along with Maneri and Karanja, Arjuni and Fukimeta have been actually partitioned. In regard to Chichgarh Zamindari, the Judicial Commissioner has held that, though it cannot be divided by metes and bounds, the co-sharers of the Zamindari are entitled to divide the profits thereof in proportion to their respective shares In regard to Chutia, Palasgaon, Chichwada and Bijli, it has been held that those Zamindaris are not impartible and that the co-sharers are entitled to share the profits of the Zamindari. In regard to Gondumri, the present Zamindar had actually made an application to have it partitioned between himself and his co-sharers, but the application had to be filed owing to the commencement of the settlement operations. With reference to Bhadra Zamindari, the learned Judicial Commissioner had held that it is not impartible and that half share thereof could be attached and sold in execution of the decree against Faizuddin, brother of the Zamindar. It has also been shown that the history of succession in the Zamindaris of Kampta (including Deori-Kishori and Warad) and Hatta does not justify a finding that those Zamindaris are impartible and governed, as regards succession, by the rule of primogeniture. In the face of this evidence—and there is no other

evidence before me in proof of territorial custom—it would be simply absurd to contend that the territorial custom set up by the plaintiff has been proved. On the contrary, the proof is exactly the other way. My finding on issue No. 10, therefore, is that the plaintiff has failed to prove the territorial custom pleaded by him in this case."

The Judicial Commissioners, in consequence of the method they adopted, did not record their findings on the issues specifically in the same way as the District Judge. They summarise their judgment as follows:—

"The Amgaon Zamindari before the Thirty Years' Settlement was of the nature of a *raj* and therefore impartible and subject to the rule of single succession, the other members of the family of the Zamindar of the moment being entitled to a suitable maintenance and not to any specific share in the income. . . . In addition, a custom had by that time grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those conditions. . . . Nothing occurred at the Thirty Years' Settlement or has occurred since to alter the nature of the grant or to affect the validity of the family custom."

Their Lordships presume that by the first portion of their finding the Court of the Judicial Commissioners came to the conclusion that the Amgaon estate was from its nature a *raj* and therefore impartible. In that view, it was unnecessary for them to consider whether it was so also by virtue of a territorial custom (Issue 10). But inasmuch as they say that their "decision will almost certainly govern nearly all the estates of the group known as the Zamindaris of Bhandara and Balaghat or the Wainganga Zamindaris," it may be taken that they found Issues Nos. 1, 2 and 10 all in favour of the plaintiff, though they do not say so specifically.

As already stated, the Appellate Court founded their conclusion chiefly upon a view of certain official Reports put forward in the plaintiff's supplementary statement. This is what they say:—

"Now it is perfectly clear from the history of the estates given in the 'Report on the Zamindaris and other Petty Chieftaincies in the Central Provinces' submitted to the Government of India in 1863 by Sir R. Temple and in the Bhandara Settlement Report of 1868, and from the summaries of that history in the Note [by Sir Reginald Craddock] already mentioned, that before 1860 the Wainganga Zamindaris were of exactly the same nature as the Chanda, Raipur and Bilaspur Zamindaris and the Chhindwara Jagirs with a difference only in degree ; indeed, their difference from some, if not all, of the estates classed as Feudatories was of degree only and not of quality. Every one of these estates was before the Settlement a real Zamindari of the nature of a *raj*. . . . Such an estate is impartible and subject to the rule of single succession, and does not admit of any coparcenary."

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Their Lordships have carefully examined the Reports in question, as well as the earlier Report by Sir Richard Jenkins dated 1827 and a later history contained in the District Gazetteer for Bhandara by Mr. Russell, I. C. S., all referred to in the judgment of the District Judge.

Sir R. Jenkins was British Resident at the Mahratta Court of Nagpur from 1810, and submitted a Report to the Government of India on the whole administration of the Nagpur State, then conducted under British supervision, in the course of which there is given an instructive history of the Province and all the institutions thereof. Sir R. Temple was Chief Commissioner of the Central Provinces after the British annexation in 1854, and submitted his Report to the Government of India with a view to the forthcoming Revenue Settlement for 30 years. Mr. Lawrence was the officer in charge of that Settlement. Sir Reginald Craddock, afterwards Chief Commissioner, recorded, as Secretary to the Local Government, a Note for Governmnt use on the status of the Zamindars of the Central Provinces which goes exhaustively into the whole question.

All these Reports were freely referred to at the Bar, and their Lordships consider that, so far as they contain a historical narrative of the Zamindari of Amgaon as well as the other Zamindaris in the Central Provinces referred to therein, they are of great value, and probably the best available history thereof under the circumstances.

Before considering these Reports, their Lordships think it necessary to note that the word *"raj"* by itself does not necessarily imply impartibility. The State of Nagpur itself, though undoubtedly a *Raj*, was not impartible, but was repeatedly divided, and when we consider that, of these Zamindaris, more than a hundred in number, some existed from before the time of the Gond Rajas, viz., from the time of the Rajputs who preceded the Gonds, some were created by the Gond Rajas, and some by the Bhonslas, who did not obtain the sovereignty of Nagpur till after 1750, it would follow that, as regards antiquity at least, there is very great difference between these estates, by whatever name they may have been called.

It may or may not be correct that many of these Zamindars were merely holders of office with no interest in the soil. It is always difficult at this distance of time to distinguish between Zamindaris of which the holders were entitled to the soil as ancient Chieftains, and cases where from office-holders or rent-

collectors they developed in course of time into proprietors of the soil. But it is settled law that unless considerable age can be ascribed to any particular Zamindari, of whichever class it may be, it cannot claim to be governed by either ancient or invariable custom.

Now, after a consideration of all these Reports, their Lordships are unable to accept the conclusion of the Judicial Commissioners that the Amgaon estate was of the nature of a *raj* and therefore impartible.

It is obvious that there is considerable difference both as regards nature, origin and quality between the different Zamindaris. It is true that in some parts of Sir R. Temple's Report he described the Zamindars generally as "dependent Chiefs" and said that, "although there may be differences in the origin of some of the tenures, and also differences of degree, the status of their holders will be found in every case to be now essentially the same." But he was far from expressing the view that every one of them was of the nature of a *raj,* and was, on the contrary, urging that even those who had been previously independent Chieftains had *by that time* been reduced to the position of either Talukdars or mere Malguzars.

With regard to the Zamindaris of the Wainganga District, with which only this case is concerned, this is what Sir R. Temple said in Appendix B :—

"The larger Zamindars in this class do not hold their tenures by any very ancient or strong title.

"The first seven Zamindaris, viz, (1) Kampta, (2) Matta, (3) Amgaon, (4) Binjhli, (5) Pulkhaira, (6) Purara, and (7) Tikheri-Malpuri, were originally includid in Kampta; and Kampta was not technically a Zamindari until A.D. 1843. It seems, indeed, to have been rather of the nature of a Talukdari tenure. The tract was known as the Kampta Taluk, and its holder was designated a Patel . . . Kampta was certainly reported by Mr Jenkins as a Zamindari; but nevertheless his Report bears out the above remarks. And, moreover, the holder's petition in A D. 1843 begs for, and the Raja of Nagpur's takid (injunction) in reply confers, the title of Zamindar for the first time on payment of a heavy nazar."

And further on:—

"On the whole, the Zamindars of the Wainganga District present, from one point of view, a weaker aspect as chiefs than the Zamindars of other classes. . . . They were situated nearer the seat of Government, and, being in a comparatively open and accessible country, they obtained less lenient terms than the Zamindars of Chhattisgarh, or the Chiefs of Sambalpur, or the hill Thakurs of Chhindwara."

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With regard to Amgaon, it is stated in the same Appendix as follows:—

"This originally formed part of the Kampta Estate, the second holder of which, Gondu Patel, brother of Ram Patel, in the time of Raghoji I, apportioned Amgaon to his nephew, Sau Patel. In A.D 1819, Sau Patel was succeeded by his nephew, Tania Bapu, who died in 1838. After this the estate remained under Government management for four years, owing to a dispute about the succession, but in A.D. 1843 the late Raja of Nagpur continued the estate, which then for the first time was called a Zamindari, to an adopted son of Tania Bapu, named Chimna Patel. This individual died in A.D. 1862, and was succeeded by his son Raghoba, a minor."

It would appear from Mr. Lawrence's Settlement Report that Amgaon was not a part of Kampta Taluka, as Sir R. Temple thought. The plaintiff admitted this fact in his supplementary statement, but whichever is correct, Sir R. Temple or Mr. Lawrence, Amgaon was not conferred on Pandoo, but on his son Sonba by a patta or painama dated 1796. It may well be doubted whether an estate of which the origin dates back only to 1796 could claim at the time of the Thirty Years' Settlement in 1863 that it was governed by an *ancient* and *invariable* custom.

It appears, moreover, from Sir Reginald Craddock's Note that after a good deal of correspondence between Sir R. Temple, as Chief Commissioner of the Central Provinces, and the Government of India, it was finally decided that only holders of certain estates should be recognised as Feudatories, and all others as ordinary subjects. Sanads were granted to the former, expressly mentioning that the succession was in their case to be a single heir. That provision was omitted in the case of sanads to most Zamindars of the second class, amongst whom was included the Amgaon Zamindar, though with regard to some others like Chanda that condition was expressly attached.

The learned Judicial Commissioners appear to have fallen into an error in considering that it was "due to some mistake or a series of mistakes that a sanad on the lines of what is known as the Chanda Patent was never given to the proprietors of the Wainganga Zamindaris." It was the result not of mistake, but of a classification deliberately made in view of the nature, origin and status of the different Zamindaris in the Central Provinces.

Having regard to the fact that these experienced officials were dealing with Zamindaris in the Central Provinces which belonged to all the three classes of Zamindars previously men-

tioned, it would be strange if they were all found to be "of the same kind, with a difference only in degree," as the Judicial Commissioners assumed.

On a careful perusal, however, of all these Reports, their Lordships find that, so far from finding them all to be of "the nature of a *raj*", it was found necessary to divide and classify them (*a*) as *Feudatories*, having semi-sovereign rights in some degree (real Rajas), and (*b*) ordinary subjects. These last were again subdivided into—

(*a*) Those who were recognised to have proprietary rights unrestricted, such as the Zamindars of Balaghat and Bhandara.

(*b*) With proprietary rights restricted, such as the Zamindars of Chanda, Bilaspur and Chhindwara.

(*c*) Those whose proprietary rights were not yet recognised, *e.g.*, Sambalpur.

There are passages here and there both in Sir Richard Jenkins' Report and Sir R. Temple's Report which speak of all these Zamindaris indiscriminately as Chiefs or Chieftains, but on a complete perusal it becomes apparent that they are clearly and carefully distinguished, and when the origin of the Kampta Zamindari and the Amgaon Zamindari, of which the former is sometimes, but wrongly, said to be the parent, as given in these Reports, is considered, it becomes fairly obvious that they are of both such comparatively modern origin (not earlier than 1796 and possibly as late as 1843 when they first obtained recognition as titular Zamindaris), and the circumstances under which they came into existence and continued are such that they could not possibly be classed as appertaining to the category of sovereign or semi-sovereign Chiefs whose possessions were necessarily impartible.

Their Lordships agree with the decision of the District Judge on Issues Nos. 1, 2 and 10, and consider that neither by the terms of the grant, nor by territorial custom, any more than by its inherent nature, can the Zamindari of Amgaon be considered an impartible estate.

There remains for consideration Issue No. 9—the question of family custom, which the District Judge rightly considered as the most important issue in the case. Plaintiff sought to make out this custom, first, by proving that in the family which was in possession of Amgaon itself this custom

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grew up, and, secondly, that it was derived from the parent stock—the family of Kolhu, the original grantee of the Kampta Zamindari.

The custom alleged by the plaintiff was that in the Amgaon family only the Zamindari, but nothing else, passed according to the rule of primogeniture.

The District Judge finds on the evidence that every instance of devolution in the family was in strict accordance with the ordinary rules of Hindu law governing succession, and that not a single Zamindar from Somba downwards left more than one heir at his death, and therefore there was not one instance of anomalous or irregular succession in the Amgaon family. Their Lordships see no ground to differ from this conclusion.

As regards instances of such irregular succession in other branches of the family of Kolhu, the District Judge dealt with Palkhera and Kirnapur, which were two Zamindaris belonging to other branches of the family of Kolhu.

With regard to Palkhera, it appears that it did not afford even a single instance of succession by primogeniture, and that there had been in fact a division of the Zamindari amongst the sons of Deoo.

With regard to Kirnapur, it would appear that succession had in many instances up to 1846 depended entirely on the will of the Sovereign power. Further, at the Thirty Years' Settlement, proprietary rights were recognised as being vested in three brothers, and not in one of them only.

There have been certain decisions with regard to some of these Bhandara Zamindaris in the Judicial Commissioner's Court at Nagpur which are referred to in both the judgments in this case. They are not altogether consistent and were necessarily based on the evidence adduced in those particular cases. Their Lordships do not think it would serve any useful purpose to examine these decisions for the purposes of this case.

On a consideration of the whole evidence, their Lordships are unable to concur in the conclusion of the Judicial Commissioners that by the time of the Settlement a custom had grown up in the Amgaon family that the estate should be held as an impartible estate subject to the rule of single succession. They agree with the District Judge that the family custom relied upon by the plaintiff has not been proved.

Their Lordships therefore humbly advise His Majesty that the judgment and decree of the Judicial Commissioners dated the 1st March, 1920, should be set aside and the judgment of the

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District Judge restored. The plaintiff-respondent must pay the costs of the appeal in the Judicial Commissioners' Court, as also of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDIGATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

P. I. Govindaraju Naicker ... *Plaintiff**

v.

P. Kassim Sahib and four others ... *Defendants.*

Govindaraju Naicker v. Kassim Sahib.

Civil Procedure Code, O. 6, R. 17—Initial want of jurisdiction in court to entertain suit—Power of court to order amendment of plaint.

Where a court has not got initial jurisdiction to entertain a suit, it has no power to grant an amendment of the plaint in that suit.

Govindasami v. *Kaliaperumal,* (1922) M W N 83, distinguished.

R. Ramachandra Chetty for plaintiff.

Mahommad Ibrahim and *T. Krishnaswami Naicker* for 2nd defendant.

K. Raja Aiyar and *V. Ramaswami Aiyar* for 3rd defendant.

The Court delivered the following

JUDGMENT :—This is an application for leave to amend the plaint and it raises the question whether I can grant an amendment in a suit which I have no jurisdiction to try. The facts are briefly these. The plaintiff purchased from the 1st and 4th defendants, 7,500 trees in a garden situated at Tiruvottiyur, beyond the limits of the City of Madras. That garden, along with some properties in the City, had been previously mortgaged by those defendants to defendants 2 and 3 under two deeds of mortgage, the first of 1917 and the second of 1920.

The plaintiff as the purchaser of the trees, alleging a right to redeem, filed the present suit, *inter alia,* for redemption of the Tiruvottiyur garden (land as well as trees), on payment of Rs. 5,000, a part of the mortgage amount secured by the second mortgage.

In regard to this relief, the plaintiff's case was that, although the first of the mortgages was for Rs. 19,000 and the

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*C. S. No. 37 of 1925 and appln. for amendment of plaint therein. 9th December, 1927.

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second was for Rs. 14,500, there was a clause in the second deed, which empowered him to redeem the mofussil property alone, on payment of Rs. 5,000. Thus it will be seen, that the relief he claimed was, in respect of the property outside the City of Madras; but curiously enough the plaintiff under some mistake applied for leave to institute the suit in this Court and he seems to have obtained it. The leave was of course applied for and granted, on the footing that some portion of the property covered by the suit was within the jurisdiction of this Court. It now turns out that he was mistaken and took a wholly wrong view of the situation. The plaintiff having realised his mistake has now asked me to allow him to amend his plaint. He seeks to amend it in this way. He desires, on payment of the whole amount due, to redeem all the properties comprised in the two mortgages—properties situated at Tiruvottiyur as well as at Madras. If this was the original frame of the suit, there could have been no objection on the ground of jurisdiction. The question is, can I now allow the plaint to be amended? For the defendants, it is urged that the Court not having initially jurisdiction, no order can be made in such a suit, for, it is said, when a Court cannot try a case for want of jurisdiction, it stands to reason that in such a suit it can make no valid order. It seems to me that this contention is sound in principle, as it is logical to hold, that, when the Court has no right to try the case itself, it cannot give directions in that very suit, which can be done only on the assumption that the Court is lawfully seized of that action. Not only is this sound in principle, but such authority, as I find, seems to support this view. In *Mahalingam* v. *Natesa Aiyar* (1), Seshagiri Aiyar, J., was of this opinion, although as the case could be decided on another ground, Sir John Wallis, C. J., expressed no opinion on the point. In *Kannuswami* v. *Jagadambal* (2) the point was discussed at some length by Sadasiva Aiyar, J., who takes this view, although Oldfield, J., was content to rest his judgment on another ground. The same point was again considered by Sadasiva Aiyar, J., in *Govindasami* v. *Kaliaperumal* (3), and that learned Judge reiterated his previous view, although in the circumstances of that case, Coutts Trotter, J., (as he then was) was not disposed to agree with Sadasiva

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1. (1915) 3 L W 107.
2. (1918) I L R 41 M 701 : 35 M L J 27. 3. (1922) M W N 83.

Aiyar, J. It was a case relating to reliefs under S. 92 of the Civil Procedure Code, which could not have been filed in a District Munsif's Court. The suit was however filed in such a Court and the reliefs comprised not only those obnoxious to S. 92 but other reliefs as well. The plaintiff abandoned the reliefs that fell under S. 92 and the parties entered into a compromise in regard to the other reliefs only; and the question arose, could the District Munsif give effect to that compromise? This case is clearly distinguishable from the present, for, under *O.* 23, R. 1, *Civil Procedure Code,* the plaintiff may, at any time, after the institution of the suit, abandon a part of his claim. This is exactly what the plaintiff in that case did. The Court in such cases is not called on to give any direction. It is left to the plaintiff's option to abandon a part of his claim, and if he chooses to pursue that course, the Court cannot prevent him from doing so. It is no concern of the Court at all and it is not called on to make any order. It is the act of the plaintiff and the plaintiff alone and the Court takes no part in it. In such a case, therefore, it cannot be said that the Court is making any order, and this therefore does not contravene the rule that the Court cannot make a valid order in a suit which it cannot try for want of jurisdiction. Although Coutts Trotter, J., did not in his judgment refer to *O.* 23, *R.* 1, *Civil Procedure Code*, his conclusion, if I may say so with great respect, is correct, in view of this provision and the decision in that case does not bear on the point with which I am dealing. These are the only cases on the point; but there is also a section in the Civil Procedure Code, which throws a great light on the question. *S.* 35 which deals with costs, after saying, that the Court shall have full power to determine by whom or from what property and to what extent, costs are to be paid, adds significantly,

"the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers"

This clearly suggests that, but for that provision, the Court would have no power to make an order in a case over which it has no jurisdiction. I have therefore come to the conclusion that the amendment cannot be allowed and the application is therefore dismissed. I am asked to make it clear that I have dealt with no other point than that of jurisdiction. It also follows that the suit itself is incompetent and it stands dismissed with costs of defendants 2 and 3 (one set).

N. S. *Application and suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATACHARIAR.

Ramakrishna Reddiar ... *Appellant** (3rd *Deft.*).

v.

Kasivasi Chidambara Swamigal (died) and three others ... *Respondents* (*Defts.* 1 & 2 *and L. R. of the plaintiff*).

Ramakrishna Reddiar v. Kasivasi Chidambara Swamigal.

Hindu law—Minor—Agreement of sale of immoveable property by natural guardian—Agreement entered into for necessity—Subsequent purchaser of the properties from the guardian with notice of the agreement—Agreement if sepcifically enforceable against the minor or the transferee—Powers of natural guardian to deal with the minor's estate.

An agreement of sale of immoveable property of a Hindu minor entered into on his behalf by his natural guardian, assuming the same to have been entered into for necessity, is not binding on the minor and enforceable specifically against him or a subsequent transferee of the properties from the guardian who took with notice of the agreement.

Ramajogayya v. *Jagannadhan*, (1918) I. L. R. 42 Mad. 185 : 36 M. L. J. 29 (F. B.), explained and distinguished.

The powers of a natural guardian of a Hindu minor to deal with the minor's estate discussed,

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss in S. A. No. 51 of 1922, preferred to the High Court against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 33 of 1921, preferred against the decree of the District Munsif of Chidambaram in O. S. No. 319 of 1917.

B. Sitarama Rao and *N. S. Srinivasa Aiyar* for applt.

M. Patanjali Sastri and *R. Narasimhachari* for Respts.

The Court delivered the following

Wallace, J.

JUDGMENT :—*Wallace, J.* :—This is an appeal against the judgment of Mr. Justice Devadoss in S. A. No. 51 of 1922. The point for decision is whether a guardian of a Hindu minor can bind his ward by a personal covenant for sale of the minor's estate so that specific performance of the contract may be decreed against the minor. The learned Judge held on the authority of a Full Bench ruling in *Ramajogayya* v. *Jagannadhan* (1) that the minor can be bound. Before us it has been argued that that Full Bench ruling does not go so far as

*L. P. A. No. 67 of 1924. 7th September, 1927.

1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).

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the learned Judge takes it, and I am of opinion that this contention is well-founded.

It may be taken for purposes of argument in this case that the proposed sale was for necessary purposes. The same was the case in the Full Bench ruling. The question referred to the Full Bench was "whether any decree, and if so, what decree can be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit under which covenant no charge is made on the estate" and in answering this question full weight was given by the Full Bench to the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* (2) which was interpreted to mean that the guardian of a Hindu minor could not bind his ward by a personal covenant. That is how the learned Chief Justice begins his judgment, and he proceeds to lay down that the general proposition laid down by the Privy Council will not affect the liability of the minor's estate for necessary purposes, and he points out that in all the cases cited before the Full Bench the minor's estate could have been liable independantly of any contract by the guardian. He answered the question refered by saying that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by his guardian for his benefit evidently drawing a distinction between a purpose of benefit and a purpose of necessity. The other two learned Judges were agreed that *Waghela Rajsanji* v. *Shekh Masludin* (2) meant that an onerous covenant cannot be imposed by the guardian upon the person or property of a Hindu minor, but laid down that where a Hindu minor's estate would be liable but for the interposition of the guardian, an undertaking by the latter of that liability would bind the estate, and that the Privy Council ruling in *Waghela Rajsanji* v. *Shekh Masludin* (2) did not affect the Hindu Law liability of a minor. They answered the question by saying that a decree can be passed on a contract by the guardian in cases where the minor's estate would have been liable under his personal law. I take this to mean that a guardian can bind a minor by contract or personal covenant only so far as his Hindu Law obligation will bind him, that when a contract by a guardian undertakes on behalf of the minor no more than the liability which the minor carries under his personal Hindu Law, that is, when the guardian's contract

2. (1887) L R 14 I A 89 ; I L R 11 B 551 (P C).

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merely embodies that Hindu Law liability of the minor, it can be enforced against the minor; and that this is the sole exception to the general law that a guardian cannot bind the minor by a personal covenant. That this is their meaning is indicated by the statement of Seshagiri Aiyar, J., that his conclusion was the same as that of the learned Chief Justice, only that it was put in other words. So that the Full Bench case comes to this, that is, so far, and only in so far, as the contract by the guardian embodies the personal Hindu Law liability of the minor is it enforceable against the minor and in so far as it goes beyond that it comes under the general rule that a guardian cannot bind his ward by a personal covenant. The principle is clear: By such a restricted covenant the guardian is not laying on the minor any greater burden than he already has to bear under his personal law and therefore to enforce the covenant by the guardian is merely to enforce a liability which the minor has *aliunde* to carry.

Now in the case before us, in which it is sought to hold the minor liable for specific performance of a contract by his guardian to sell his property, it is obvious that the covenant goes beyond the personal Hindu Law liability of the minor. Hindu law does not compel him to discharge debts for necessary purposes by contracting to sell his property; it merely compels him to discharge the debts; it does not lay down the method in which he shall discharge or restrict him to any one method; it is not concerned with what method he adopts, provided the debts are discharged. It appears to me therefore that on this ground alone it must be held that the minor is not bound by the guardian's covenant in this suit. The minor's personal liability extends only to the discharge of the debt. He may choose his own method, by selling land or borrowing elsewhere by mortgage, by suffering decree in a suit. He cannot be forced by the law to adopt one particular method, nor is there any authority for that proposition in *Ramajogayya* v. *Jagannadhan* (1). In this view I do not think it necessary to consider at length most of the cases cited before us. I shall deal with those cases put forward by the respondent as indicating in his view that the general proposition deduced from *Waghela Rajsanji* v. *Shekh Masluddin* (2) is too wide and that a Hindu guardian may in certain circumstances bind his ward by a personal covenant which goes beyond the ordinary Hindu Law liability of the ward.

1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).
2. (1887) L R 14 I A 89 : I L R 11 B 551 (P C).

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These cases were *Watson and Company* v. *Sham Lal Mitter* (3), *Krishnaswami* v. *Sundarappier* (4) and *Krishna Chettiar* v. *Nagamani Ammal* (5). In *Watson & Company* v. *Sham Lal Mitter* (3) a Kabuliat signed by the guardian agreeing to pay an enhanced rent for land was held binding on the ward. But this was really a case not of a contract, but of a compromise of litigation and I do not find it of such assistance here. *Krishnaswami* v. *Sundarappayyar* (4) is a ruling of a Bench of this Court in which it was held that a contract by a guardian of a Hindu minor for sale of his land was binding on the minor. It proceeded on the general ground that the English doctrine that specific performance cannot be decreed against a minor does not hold in this country; but the Privy Council has certainly laid down the contrary—see *Waghela Rajsanji* v. *Shekh Masludin* (2) already cited and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6). The case in *Krishna Chettiar* v. *Nagamani Ammal* (5) held that a promissory note executed by a guardian of a Hindu minor for purposes binding on him is enforceable against his estate. But this, it appears to me, would come directly within the ambit of *Ramajogayya* v. *Jagannadhan* (1) and is in fact decided on the very same line of argument. A very similar case is in *Venkataswami Naicker* v. *Muthuswami Pillai* (7).

Other cases cited before us may be very shortly dealt with. In *Abdul Haq* v. *Muhammad Yahya Khan* (8) one learned Judge of the Patna High Court has held that the Privy Council case in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (6) means that "it is quite impossible for the court to decree specific performance against a minor". So holds a Calcutta Bench in *Srinath Battacharya* v. *Jatindra Mohan Chatterji* (9). In *Swarath Ram Ram Saran* v. *Ram Ballabh* (10) a Bench of Judges also favour that interpretation although they do not definitely decide on it. In *Innatunnessa Bibi* v. *Janaki Nath Sircar* (11) a Bench of the Calcutta High Court,

1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).
2. (1887) L R 14 I A 89 : I L R 11 B 551 (P C).
3. (1887) L R 14 I A 178 : I L R 15 C 8 (P C).
4. (1894) I L R 18 M 415 : 5 M L J 164.
5. (1915) I L R 39 M 915.
6. (1911) L R 39 I A 1 : I L R 39 C 232 : 21 M L J 1156 (P C).
7. (1917) 34 M L J 177. 8. (1923) 4 Pat. L T 553.
9. (1925) 30 C W N 263. 10. (1925) I L R 47 A 784.
11. (1917) 22 C W N 477.

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held that a contract by a guardian to sell the minor's property would bind the minor where the District Court had sanctioned the contract. No reasons are given. One of the learned Judges who was a party to that decision declined in a subsequent decision reported in *Tarini Kumar Dutta* v. *Srish Chandra Das* (12) to decide the general issue whether a suit for specific performance of a contract for sale of a minor's property entered into by a guardian with permission of court was maintainable. *Narayana Row* v. *Venkatasubba Row* (13), a decision of this court, follows *Mir Sarwarjan* v. *Fakruddin Mahomed Chowdhury* (6), and *Sanka Krishnamurthi* v. *Bank of Burma* (14) follows *Waghela Rajsanji* v. *Shekh Masluddin* (2).

It was argued for the respondent that, on general principles, if a contract to sell by the guardian is not binding on the minor, the subsequent sale based on such contract must also be not binding. This contention does not resolve the difficulty in the respondent's way created by the Privy Council decisions, and would, if pressed to its logical conclusion, imply that no sale of a minor's property by his guardian even for necessary purposes can bind the minor. The solution of this problem is I think to be found in the view of the concurring Judges in *Ramajogayya* v. *Jagannadham* (1). When the sale has been completed there is no longer any Hindu Law liability on the minor. His debt has disappeared by the sale and the liability is therefore at an end.

I must hold therefore that the plaintiff cannot in law enforce on this minor specific performance of the guardian's contract to sell his estate. There was no mutuality in the contract and the contract is therefore void. Since the plaintiff cannot enforce it on the minor, he cannot enforce it on any third party such as the 3rd defendant, to whom the land was subsequently sold by the guardian. The 3rd defendant cannot in any sense be in the position of a trustee for the plaintiff of the property, since the plaintiff could not enforce his original contract.

In the result the decree of the learned Judge must be reversed. We reverse it and restore that of the lower appellate

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1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).
2. (1887) L R 14 I A 81 : I L R 11 B 551 (P C).
6. (1911) L R 39 I A 1 : I L R 39 C 232 : 21 M L J 1156 (P C).
12. (1924) 85 I C 667.
13. (1919) 38 M L J 77.
14. (1911) I L R 35 M 692 : 21 M L J 620.

court with costs to the 3rd defendant throughout to be paid by plaintiff.

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Tiruvenkata Achariyar, J. :—I have had the advantage of perusing the judgment of my learned brother. I agree with him; but as the question is one of some importance and we are differing from Mr. Justice Devadoss, I wish to add a few words.

The main question argued before us is as follows :—Is an agreement of sale of the immoveable property of a Hindu minor entered into on his behalf by his natural guardian, assuming the same to have been entered into for necessity, binding on the minor and enforceable specifically against him ?

As regards the powers of a natural guardian of a minor to deal with the minor's estate and bind the minor by his contracts, the following propositions are well established :—

(1) The guardian may in case of necessity sell or mortgage his ward's property to the extent of such necessity.

(2) The guardian may also without charging the estate, contract loans for necessary purposes which he could not otherwise meet; the term necessary purposes being understood as comprising all that is necessary to meet the wants of the minor and of other members of the family who have claims either against him personally or against his estate. The creditor in such cases cannot enforce the claim against the minor personally but may enforce it against his properties.

(3) The guardian cannot enter into any covenants in the name of the ward so as to impose a personal liability upon him.

In my opinion the present case falls under the third proposition, whereas, the case in *Ramajogayya* v. *Jagannadhan* (1) falls under the 2nd proposition, as I shall show presently. The suit in this case which was brought by the respondent is to enforce an agreement entered into by the minor's natural guardian binding the minor to convey to the plaintiff certain immoveable properties belonging to him for the purposes of discharging debts already due to him by the father of the minor and which may be enforced against the minor's estate which he has either inheritted from his father or to which he has succeeded by survivorship. Such an agreement does not fall under the first proposition, as an agreement of sale does not of itself create any right to or interest in immoveable property, nor does it fall under the second, because there has been no renewal of the debt or covenant on the part of the guardian on the minor's behalf for the repayment of the debt. The old debt still remains as it was

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before the agreement and the only covenant entered into on behalf of the minor is that he will convey his properties to the plaintiff in consideration of the debts mentioned in the agreement. Such a covenant is one which, if valid, imposes a personal liability upon him. It is beyond the competence of a natural guardian to enter into such covenants on behalf of the ward. This position must be taken to be conclusively settled by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6) following the *ratio decedendi* of their own previous decision in *Waghela Rajsanji* v. *Shekh Masludin* (2). So far as the covenant is concerned it makes no difference whether it is one which binds the minor to sell his property or to purchase the property of the other party to the agreement. In either case it is a covenant imposing upon him personal liability [see per Spencer, J., in *Narayan Row* v. *Venkatasubba Rao* (13)].

In *Mir Sarwarjan* v. *Fakruddin Mahomed Chowdhuri* (6) the minor on whose behalf a covenant to purchase immoveable property was entered into by his guardian brought a suit to enforce the agreement. Their Lordships assuming that the contract was for his benefit held nevertheless that he could not enforce it, as the agreement was not binding on him, as it was incompetent to the guardian to bind him by such a covenant which imposes a personal liability upon him. As he was not bound by the agreement, there was no mutuality and hence he cannot enforce it specifically against the other party. The circumstance that, when their Lordships were dealing with the case, the minor had attained majority made no difference. Being a void agreement it was not capable of being ratified by him after he attained majority. The *ratio decidendi* of this case has been held to be equally applicable to cases in which an agreement for the sale of his properties entered into by his guardian was sought to be specifically enforced against him. See *Srinath Bhattacharya* v. *Jatindra Mohun Chatterji* (9), *Abdul Haq* v. *Muhammad Yahya Khan* (8) and *Swarath Ram Ram Saran* v. *Ram Ballabh* (10).

In *Srinath Bhattacharya* v. *Jatindra Mohan Chatterji* (9) an agreement for the sale of the minor's property was entered

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2. (1887) L R 14 I A 178 : I L R 11 B 551 (P C).
6. (1911) L R 39 I A 1 : I L R 39 C 232 : 21 M L J 1156 (P C).
8. (1923) 4 Pat. L T 553. 9. (1925) 30 C W N 263.
10. (1925) I L R 47 A 784, at p. 793.
13. (1919) 38 M L J 77, at p. 80.

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into on behalf of the minor for the payment of his father's debt. The learned Judges of the Calcutta High Court held that no distinction can be drawn between the case of the covenant binding a minor to purchase property and a covenant binding him to sell his property and that the latter covenant also should be held not binding on the minor on the authority of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6). The learned Judges also pointed out that if the guardian had effected the sale himself for some necessary purpose it would bind the minor but that a contract to sell stood on a different footing.

Abdul Haq v. *Muhammad Yahya Khan* (8) is a decision of the Patna High Court, the question involved being whether an agreement entered into on behalf of the minor for the sale of his properties can be specifically enforced against him. The learned Judges, following *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6), observe that no distinction can be drawn between an agreement to purchase and an agreement to sell and that the latter agreement cannot also be enforced against the minor. A further question was also raised in this case which also is raised in the present case, *viz.*, whether the agreement can be enforced against a subsequent transferee of the same property who took with notice of the prior agreement. The learned Judges held that if the minor is not bound by the agreement the transferee is also not bound by it.

In *Swarath Ram Ram Saran* v. *Ram Ballabh* (10) the same view was held that an agreement binding the minor to sell his property cannot be specifically enforced as it was a contract to enforce a covenant imposing a personal obligation on the minor and that the question was concluded by the decision of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6). The present case is on all fours with the above cases; but the learned Judge has however held that the agreement is specifically enforceable against the minor and it is governed by the decision of a Full Bench of this court in *Ramajogayya* v. *Jagannadhan* (1). The material facts of that case are as follows:—The mother and natural guardian of a minor son borrowed for a necessary purpose, *viz.*, the marriage of the minor's sister, a sum of money from the plaintiff and to secure the loan she executed a deed of mortgage in his favour of the minor's properties and she also entered into a

1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).
6. (1911) L R 39 I A 1 · I L R 39 C 232 · 21 M L J 1156 (P C).
8. (1923) 4 Pat. L T 553. 10. (1925) I L R 47 A 784.

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covenant on her own behalf to repay the debt. The mortgagee sued to enforce the mortgage but unfortunately for him the mortgage, which was of properties within the Agency tracts of Godaveri, was held to be invalid as it could not be validly effected without the sanction of the Agent to the Governor, which had not been obtained. The mortgage having proved invalid the question was: what was the remedy open to the plaintiff (creditor) in respect of the loan which was found to have been incurred out of necessity. The Court of first instance gave a decree for the creditor against the properties of the minor. But on appeal the Agent to the Governor held that the creditor was not entitled to any relief at all. There was a further appeal to this court and all that was held as a result of the reference to the Full Bench was that the creditor was entitled to have his loan satisfied out of the properties of the minor. All the members of the Full Bench agreed that the minor's sister's marriage was a necessary purpose for the expenses of which the minor's estate was under the law liable and that the loan borrowed for such purposes out of necessity could be enforced against the minor's properties. The only apparent difference was as to how that conclusion was reached. The learned Chief Justice regarded the loan to the guardian as supplying a necessary for the minor and as governed by the principle if not also the language of S. 68 of the Indian Contract Act. The other two learned Judges held that the loan raised by the guardian was only for discharging a pre-existing liability and that it was within the competence of the guardian to raise such a loan and the creditor besides his own remedy against the guardian on the personal covenant, entered into by the latter, had also his remedy against the minor's estate on which the liability to meet the charge for his sister's marriage already rested by law. If the creditor had sued the guardian alone on the personal covenant and recovered the loan from her, the latter had the right to be reimbursed from the estate and the creditor could therefore stand in her shoes and be allowed to enforce his claim direct against the estate itself as had been held in previous decisions of this and other courts. In the result the plaintiff was held to be entitled to recover the amount due to him from the other properties of the minor. I respectfully think that *Ramajogayya* v. *Jagannadhan* (1) does not touch the question that arises in this case and that it

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falls, as I have already observed, under the 2nd proposition mentioned above. The agreement in the present case merely provides a mode for discharging the pre-existing liability to which the minors' estate was subject, *viz.*, by sale of the minors' property and the present suit against the minors is on the footing that they are bound by the covenant entered into in their names by the guardian to convey the properties to the plaintiff. Such a covenant is of a nature which imposes a personal liabliity on the minors, which according to the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6) must be held to be invalid. This suit is brought only to enforce that covenant and nothing else. The result is that the pre-existing liability subsists and it is open to the plaintiff to enforce the same. In fact even prior to the present suit, he has enforced a prior liability for the minors' estate in respect of one of the two debts referred to in the agreement as part consideration for the sale, *viz.*, the promisory note debt. It is equally open to him hereafter to enforce the mortgage and likewise it is equally open to the guardian of the minors or to the minors themselves when they come of the age to discharge that liability raising the requisite funds in some other manner.

As regards the Privy Council case in *Watson & Company* v. *Sham Lal Mitter* (3) relied on by the respondent, the decision of their Lordships that the Kabuliat executed by the guardian agreeing to pay enhanced rent to the Patnidar in respect of the holding of the minor was a proper arrangement made by the guardian and was binding on the minor, was based on the special circumstances of the case, *viz.*, that the Patnidar was entitled to sue for enhancement of rent in respect of the holding and a suit for enhancement of rent previously brought by him against the mother and guardian as the representative of the estate had been decreed in his favour. That decree may technically not bind the minor, but his position *qua* the Patnidar was no better than that of his mother and guardian and resistance on the minor's behalf to the Patnidar's claim would only involve the minor's estate in litigation, in which the probability of success was decidedly in favour of the Patnidar. In these circumstances their Lordships held that the act of the guardian in executing the Kabuliat in which the rate of rent

3. (1887) L R 14 I A 178 : I L R 15 C 8 (P C).
6. (1911) L R 39 I A 1 : I L R 39 C 232 : 21 M L J 1156 (P C).

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was lower than the rate decreed against her, though higher than the previous rate, was a proper arrangement binding on the minor. It was undoubtedly a fair compromise entered into for averting a litigation against the minor's estate and the decision therefore is authority for a proposition that it is within the power of the guardian to enter into such compromises on behalf of the ward. It will be noted that in this case the liability to pay rent in respect of the minor's holding was pre-existing and the only object of the arrangement was to fix the amount of that liability. This decision in no way affects the rule laid down in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6).

I therefore agree that the present case falls directly within the authority of the decision of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6) and that the view taken by the learned Judge based on *Ramajogayya* v. *Jagannadham* (1) cannot be sustained.

One other point was raised before us, *viz.*, that though the agreement may not be specifically enforceable against the minors it can be enforced against the subsequent purchaser (3rd Defendant) who took with notice of the suit agreement. The short answer to this contention is that S. 27 (*b*) of the Specific Relief Act presupposes a valid contract. But if the original agremeent itself is void and unenforceable against the minors, it follows as held by the learned Judges of the Patna High Court in *Abdul Haq* v. *Muhammad Yahya Khan* (8) that it cannot be enforced against a subsequent transferee from the guardian.

The appelants' learned vakil wanted to raise some further contentions in support of the appeal, but he was stopped pending the consideration of the questions we have dealt with above and in the view we have taken on these questions it becomes unnecessary for us to hear him on those questions.

In the result I agree with my learned brother in the order passed by him.

N. S. *Appeal allowed.*

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1. (1918) I L R 42 M 185 : 36 M L J 29 (F B).
6. (1911) L R 39 I A 1 : I L R 39 C 232 : 21 M L J 1156 (P C).
8. (1923) 4 Pat. L T 553.

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Calcutta.)

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS, AND SIR LANCELOT SANDERSON.

Benoy Krishna Mukerjee
and others ... *Appellants** (*Plaintiffs*).

v.

Satish Chandra Giri
and others ... *Respondents* (*Defendants.*)

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Benoy Krishna Mukerjee *v.* Satish Chandra Giri.

Civil Procedure Code, 1908, O. 40—Appointment of Receiver—Discretion of primary court—Interference on appeal, when permissible—Appeal to Privy Council from interlocutory orders.

On an interim application for a receivership, the court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the Court gives its protection.

The order for the appointment of a Receiver is discretionary, and the discretion is, in the first instance, that of the Court in which the suit itself is pending. But where the primary Court has not used proper discretion, in accordance with the principles on which judicial discretion must be exercised, the Appellate Court is at liberty to exercise its own discretion in the matter.

As a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for an appeal to His Majesty in Council.

Consolidated Appeal (No. 49 of 1927) from three interlocutory orders, dated the 8th January, 26th March and 31st March, 1926, of the High Court, Calcutta (Greaves and Panton, JJ.), varying the orders of the District Judge of Hooghly, dated the 9th May and 17th July, 1925, by which the High Court refused to appoint a receiver in respect of the personal properties owned and possessed by the respondent.

The material facts of the case appear from their Lordships' judgment. See also *Satish Chandra Giri* v. *Benoy Krishna* (1) for a report of the case in hte Court below.

Leave to appeal to His Majesty in Council from the aforesaid orders of the High Court was duly granted to the appellants by the High Court on the 26th May, 1926. Sir Nalini Ranjan Chatterjea, Acting Chief Justice, in granting the certi-

*P. C. Appeal No. 49 of 1927 15th December, 1927.

1. (1926) 96 I C 30.

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cate, observed that "Having regard to the exceptional circumstances stated above I think the case involves questions of great public importance and in my opinion it is a fit case for appeal under S. 109 (*c*) of the Code of Civil Procedure, 1908". Sir George C. Rankin took a different view, but "chiefly out of deference for the opinion of the Acting Chief Justice", he did not dissent. The following extracts from Rankin, J.'s order are instructive :—

"As this suit was instituted on the 15th September, 1922, and as the certificate asked for in 1926 concerns only the more or less of the properties over which a Receiver should be appointed before trial, I desire to add some observations of my own since I much fear lest we be throwing open one of the few opportunities of delay, complication and expense which settled practice has hitherto kept closed The order complained of has discharged the Receiver so far as regards properties claimed by the defendant to be his own. There is room here for the difference of opinion as to what is just and convenient before trial, and it may be conceded without any disrespect to the Division Bench that another tribunal might take the same view as the District Judge. Unless, however, the applicants can put their case on much stronger and more special ground than this, a certificate under S. 109 (*c*) of the Code must be refused. There are two decisions of this Court which show this very clearly. One is *Chundi Dutt Jha* v. *Pudmanand Singh Bahadur* (2) and the other is *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji* (3). In these cases as in the present case there had been a difference of opinion between the Courts in India. The extreme undesirability of protracting interlocutory proceedings is based partly on the fact that in point of expense it may well be the plainest oppression and partly on the fact that it tends to postpone a real elucidation of the facts by a trial of the suit. In the present case a new consideration appears prominent since it seems clear that the suit could and should be heard in less time than it will ordinarily take to obtain the judgment of the Judicial Committee upon the proposed appeal. If therefore this certificate is followed by a stay of the order appealed from, that order is in effect reversed; if it is not followed by a stay, it is likely to be ineffective altogether".

De Gruyther, K. C., and *Hyam* for appellants.

Upjohn, K. C., and *Dube* for respondents.

Their Lordships' judgment was delivered by

Viscount Sumner.

Viscount Somner :—This is an appeal from three consolidated orders of the High Court, Calcutta, which varied orders of the District Judge of Hooghly by discharging so much of them as ordered a receiver to be appointed *pendente lite* of certain properties in dispute included in "Class C." The suit had been brought against the Mohunt of the Temple of

2. (1895) I L R 22 C 928. 3. (1911) 13 C L J 507.

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Tarakeswar, alleging his unfitness for his office, and praying for his removal, and for a declaration that certain lands, claimed to be his as nij lands, were truly debottar lands belonging to the Temple, with other relief. The District Judge made interlocutory orders for a receiver of three classes of property. Those as to which his receivership order was discharged had been in the Mohunt's possession and enjoyment for a considerable number of years, and were alleged by him in some cases to have passed to him under the will of his predecessor, who had acquired them as his nij property, and in others to have been purchased by himself out of personal offerings made to him by pilgrims and others in recognition of acts of service to them. The suit, so far as their Lordships have been informed, though its prosecution has been unaccountably delayed, is still awaiting trial.

On an interim application for a receivership such as this, the Court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the Court gives its protection. Such an order is discretionary, and the discretion is, in the first instance, that of the Court in which the suit itself is pending. When, as in this case, the order of that Court is altered on appeal it becomes necessary to consider whether the Court below had before it the evidence required to support such an order and considered it in accordance with the principles on which judicial discretion must be exercised. If the Court of review* rightly concludes that proper discretion was not used below, it is free to exercise its own discretion in the matter.

There were undoubtedly in this case allegations, supported to some extent by the evidence which was given before the Trial Judge, that in various ways there was danger of loss or injury to the properties in question, if they remained in the unrestricted control of the Mohunt. He was alleged to have abandoned his office, leaving the Temple and the properties in question without proper direction and management; to have exposed the lands to sale by neglecting to pay the rents when due, and to have entered into an improper bargain, by which the claims made against him in the action were to be compromised. On all these subjects a denial of the charges was given on his side and was supported by evidence.

*In Indian practice, the word "review" has acquired a technical meaning, but Lord Sumner is here using the expression "Court of review" as being synonymous with an Appellate Court.—K. J. R.

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It is obviously undesirable that their Lordships should say anything at this stage, which could be quoted hereafter so as to prejudice either side at the trial in any way, and as it is impossible to discuss in detail the evidence which was given on these interlocutory applications, or to criticise closely the inferences and the observations of the Trial Judge, without running some risk of a misapplication hereafter of what may be said now, which would be contrary to their Lordships' meaning and desire, they think it best merely to say that, after fully considering the materials to be found in the record, they agree with the High Court's conclusions. They think that in some respects the learned Trial Judge failed to observe points in the evidence which assisted the Mohunt, and that generally he was disposed to take a more severe view of the Mohunt's past and present conduct and of the prospect that in the future he might dissipate the property than was warranted by the materials before him. There had been a good deal of popular excitement and some disturbance of order in connection with state of the Temple worship, and this led to absences of the Mohunt from active performance of his functions and to the attempted compromise, which came to nothing because, being conditional on the approval of the Court, it failed to secure that approval. In the result the learned Trial Judge made the order appointing a receiver over all the properties, which in the case of the "C class" was not altogether within the principles of a judicial exercise of discretion. The High Court in their Lordships' opinion, rightly exercised their functions in refusing to affirm the order made as to this class, and in discharging the receivership accordingly. This appeal must therefore fail.

Their Lordships remark that it was with some doubt in the mind of at least one of the Judges of the High Court that leave to appeal to His Majesty in Council was given in this case, and they think it right to add that, as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review*. Not only are the practice of the Court and the manner in which experience has shown that it is wise to apply it, better known to the High Courts in India than they can be to their Lordships, but the delay occasioned by taking this additional appeal adds gravely to the procrastination, which is already the bane of Indian litigation.

*Here again, the words "for review", when read with the context, refer to an appeal to His Majesty in Council.—K. J. R.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondents : *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

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Viscount Sumner.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS, AND SIR LANCELOT SANDERSON.

Sunder Mull and another ... *Appellants** (*Defts.*)

v.

Satya Kinker Sahana and others ... *Respondents* (*Pltfs.*).

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Sunder Mull v. Satya Kinker Sahana.

Joint Hindu Family—Karta's authority to borrow—Onus of proof—High rate of interest—Compound interest and rests—"Reasonable commercial terms"—Evidence of previous borrowings

It is now well settled that the authority of Kartas of a Hindu Joint family to borrow on the security of family property is a limited one, and, in the case of a loan to them, the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which kartas can exercise.

In the suit now under appeal to His Majesty in Council, the kartas of a Hindu Joint family executed a mortgage bond in favour of the respondents for a principal sum of Rs. 12,000, at compound interest at 15 per cent. per annum with yearly rests. Before the Privy Council there was no contention that the money was not borrowed for necessity, and the only question for decision was, whether the terms, namely, the rate of interest and the rests and the compound interest were in excess of the kartas' authority or not. Their Lordships held that the *initial* onus, which rested on the mortgagees of showing that the transaction in the form which it took was not in excess of the kartas' authority, had been discharged, and that *upon the evidence in the case,* the interest and the terms of the loan were brought within the kartas' authority as being such terms as it was reasonable and proper for them to incur at the time and under the circumstances, for the purpose of obtaining the loan in question. They were "reasonable commercial terms".

The question of compound interest cannot be regarded as entirely separable from the rate of interest. Compound interest at a moderate rate may not necessarily be oppressive and similarly compound interest with infrequent rests may not be oppressive, where compound interest coupled with a high rate of interest and with frequent rests might be in excess of any authority which the kartas could have. The whole conditions and terms of the lending have to be regarded together.

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*P. C. Appeal No. 80 of 1925. 6th December, 1927.

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There is no rule, when the terms of a loan to a karta are challenged, to lean to their reduction, or to presume that simple interest must always be judicially preferable to compound interest, or that rates of interest, because they might seem high in England, must be unreasonable in India. Compound interest is common and may often be necessary and proper in India under the circumstances of that country. "The matter is not one upon which, one way or the other, their Lordships' Board has ever decided that there is a presumption one way". *Nasir Begam* v. *Rao Raghunath Singh,* (1919) L R 46 I A 145 : I L R 41 All. 571 : 36 M L J. 521 (P C), *Ram Bujhawan Prasad Singh* v. *Nathu Ram,* (1922) L R 50 I A 14 : I L R 2 Pat. 285 : 44 M L J 615 (P C)., and *Radha Kishun* v. *Jag Sahu,* (1924) L R 51 I A 278 : I L R 4 Pat. 19 : 47 M L J 329 (P C), discussed and distinguished.

The expression 'to borrow upon reasonable commercial terms' (in Lord Phillimor'e judgment in *Nasir Begam's case,* (1919) L R 46 I A 145 : I L R 41 All. 571, at p. 576 : 36 M L J 521 (P C) is simply used in contradistincton to such terms as would be in excess of the necessity and therefore in excess of the authority of a manager of a joint Hindu family. 'Commercial terms' is obviously a relative expression. They are relative to the time and the place, the country and the part of the country, where the money is borrowed, the kind of security that is offered for the loan, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend for possibly a considerable time. The word 'commercial', in relation to parties who do not belong to a commercial community, and to transactions which no one would call mercantile, must be understood as a comprehensive but convenient expression for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case.

The above interpretation of Lord Phillimore's words, 'to borrow upon reasonable commercial terms', is equally applicable to the expression 'commercial rates' used by Lord Dunedin in *Radha Kishun* v. *Jag Sahu,* (1924) L R 51 I A 278 : I L R 4 Pat. 19, at p. 22 : 47 M L J 329 (P C).

The judgment of Lord Dunedin in *Radha Kishun's Case,* (1924) L R 51 I A 278 : I L R 4 Pat. 19 : 47 M L J 329 (P C), does not bear the interpretation that, where a karta has previously borrowed under other instruments, but on similar onerous terms, this cannot be evidence that the borrowing on the occasion in question was a reasonable and proper transaction and therefore not in excess of his authority.

Semble : Where all the evidence is in, the question of burden of proof is not of much importance, as the Court has then to decide upon the whole evidence.

Appeal (No. 80 of 1925), by special leave, from a judgment and decree of the High Court, Patna (Das and Macpherson, JJ.), dated the 28th July, 1923, in substance affirming a decree of the Additional Subordinate Judge of Hazaribagh, dated the 5th August, 1920.

The material facts of the case appear from the judgment of their Lordships.

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By the terms of the special leave the appeal was confined to the question whether there was legal necessity for the loan, for recovery of which the plaintiffs sued, being borrowed at the rate of interest and upon the terms provided in the mortgage bond of the 5th of December, 1907.

At the hearing of the suit the plaintiffs proved the consideration for the loan and its necessity, and they also proved that it was borrowed chiefly to pay off a loan to the Chota Nagapur Banking Association, Limited, who were charging a higher rate of compound interest with six monthly rests. The defendants neither suggested in cross-examination nor gave any evidence that the family could have borrowed the money they required at a cheaper rate from any one else.

Upjohn, K. C., and *Macaskie* for appellants.

De Gruyther, K. C., and *Raikes* for respondents.

Their Lordships' judgment was delivered by

Viscount Sumner.

Viscount Sumner :—This case comes before their Lordships upon special leave to appeal, by which the [illegible] discussed was very carefully limited. In December, 1907, the kartas of the six branches of a Hindu joint family, of which the present defendants were members, executed a mortgage bond in favour of the present respondents for a principal sum of Rs. 12,000, with interest at 1¼ per cent. per mensem, that is, 15 per cent. per annum, with the provision that if the interest was not paid year by year it should be treated as principal and compound interest at the same rate should be charged up to the date of payment.

The suit was commenced in 1919, when a large sum had accumulated due, since no interest had been paid at all; 37,000 rupees were then outstanding. It was for the purpose of realising the security, and the answer made by the members of the joint family, who defended it, was both that the money was not borrowed for necessity; that the terms, namely, the rate of interest and the rests and the compound interest were not justified by necessity; and therefore that it was not within the authority of the kartas to impose this burden upon the property, in which they were interested.

By the terms of the leave given, the argument is confined to the latter point, that is, whether the terms as to rate of interest, rests, and simple or compound interest were in excess of the kartas' authority or not.

Two things are well settled : that the authority of kartas to borrow on the security of family property is a limited one, and

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that, in the case of a loan to them, the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which kartas can exercise.

What is said here is first of all that the lenders made no serious or successful attempt to discharge that onus of proof, and, secondly, that such evidence as they gave, even if a *prima facie* discharge, ought to be disregarded in view of three previous decisions of their Lordships' Board.

There can be no doubt that when a case does not rest upon burden of proof alone, that is to say, where evidence has actually been given, attention must be paid in the first instance to what the witnesses have said and what evidence has been adduced. If that is credible and acceptable, further questions may never arise, for it may establish the necessary proposition that the transaction in the form which it took was not in excess of the kartas' authority.

In this case, evidence was given of this character. The vakil, who negotiated the loan, was called and gave evidence of the purpose or one of the purposes for which it was wanted, which was to clear off prior mortgages which had been entered into in the previous two or three years with a local Bank on even more onerous terms. "The interest," says this witness, Mr. Banarji, "which they were to pay at the Bank," which means which they had to pay to the Bank, "was higher than 15 per cent. At that time the Bank used to charge compound interest with six-monthly rests." This was not qualified in any way. The instruments themselves were proved. The comment on the fact that, when those instruments were proved by officials from the Bank, they were not asked to give any general opinion about the prevailing rate of interest or the terms current in the district, appears to be an unnecessary criticism, because the evidence of Mr. Banarji upon the point is uncontradicted, and it was accepted by the learned Subordinate Judge. It is true that he found the issue in question not with reference to an excess of the kartas' authority but with reference to the defence pleaded under S. 16 of the Indian Contract Act, which is often raised in these cases. He disposed of it by saying "there is nothing in the evidence to show that the rate of interest stipulated in the bond in suit is hard and unconscionable, nor can it be said that it is penal."

There was nothing to bring the present contract within the purview of S. 16 of the Indian Contract Act, and their Lord-

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ships are of opinion that, upon the evidence given at the trial and already quoted, the plaintiffs would be entitled to the rate and terms of interest claimed by them.

In the High Court this question does not appear to have been even argued, so that their Lordships have no assistance from the learned Judges upon the point, but there is no trace of any dissent. Unless the decisions that have been cited produce a contrary result, their Lordships think that the mortgagees discharged the burden of proof; that the evidence was such as it was proper for the Court to accept as credible evidence; and that it is not open to criticism merely because it did not go further. Upon that the case is proved, and the interest and the terms of the loan have been brought within the kartas' authority as being such terms as it was reasonable and proper for them to incur at the time and under the circumstances, for the purpose of obtaining this loan, which it has now to be accepted was borrowed for necessity.

Their Lordships, however, must deal with the three cases cited, which require close examination. They are binding upon their Lordships and, of course, must be loyally followed in their application.

The first is *Nasir Begam* v. *Rao Raghunath Singh* (1). In that case, upon a challenge of the reasonableness and propriety of the rate of interest and the terms, *viz.*, 37½ per cent. interest and compound interest, Lord Phillimore reasoned as follows. First he lays down the principle above stated as to the authority of the kartas. Next he says that the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued on was an unnecessary extravagance, the lands charged being of such value as to make the security ample. Then he proceeds :

"It remains, therefore, that there was necessity, and in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority. What the particular rate of interest should be and whether the money could have been borrowed at simple instead of compound interest are matters of detail upon which the High Court, with its local knowledge, can well be left to decide, and their Lordships are not disposed to interfere with the decision upon points such as these".

He then passes to a sentence in the judgment under appeal, in which the High Court, in fixing simple interest at 12 per cent. per annum as the proper rate, appear to have been

1. (1919) L R 46 I A 145 : I L R 41 A 571 : 36 M L J 521 (P C).

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guided by the view that the matter was entirely in the discretion of the Court, and, having negatived that, says:

"Their Lordships do not think it safe to rest their decision upon the supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated, that they concur in the conclusion at which that Court arrived."

Their Lordships would observe upon this opinion, that, no evidence being called on either side, instead of sending the case back to India, a dilatory and expensive course, or dismissing the suit so far as regarded the interest upon the ground that the party, who had to prove that part of his case, had failed to prove it at all, the Board adopted the figure which had been arrived at by the High Court and the decision as to simple or compound interest, not because they rested on evidence, for there was none, but because, in spite of the misapprehension as to the powers of the High Court, it established the reasonable rate and terms in the view of Judges better acquainted with the locality, its usages, its necessities and facilities, than their Lordships could be.

With regard to the expression "to borrow upon reasonable commercial terms," those words are simply used in contradistinction to such terms as would be in excess of the necessity and therefore in excess of the authority. Excess of the necessity of course relates to terms that are available, because, if you must borrow (which is assumed on this appeal) and therefore must pay interest, it cannot be in excess of the authority on that occasion to pay the terms that are necessary, when more moderate terms are not available. "Commercial terms" is obviously a relative expression. They are relative to the time and the place, the country and the part of the country, where the money is borrowed, the kind of security that is offered for the loan, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend for possibly a considerable time. They cannot be confined, as in this country they might be confined, to something connected with a publicly announced and official rate of interest for loans generally, or to a curren rate generally allowed upon the highest security in financial transactions, such as an issue of debentures, or to something regulated by the day to day supply of money and by facilities for short loans. Their Lordships think that the word "commercial" must

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be understood, in a case like this, of a community, which is not a commercial community, and of transactions which no one would call mercantile, as a comprehensive but convenient term for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case.

The same expression was used by Lord Dunedin in the subsequent case of *Radha Kishun* v. *Jag Sahu* (2) in a slightly different connection. On page 281 he speaks, of the interest charged as being "far in excess of commercial rates," but their Lordships, taking these two passages together, and having regard also to the fact that such experience as their Lordships may have of this country and its business cannot be assumed to apply equally in India, are of opinion that no more is meant by Lord Dunedin's phrase than was meant by Lord Phillimore's.

The next case cited was *Ram Bujhawan Prasad Singh* v. *Nathu Ram* (3). In that case again there was no evidence on the point in question. The Trial Judge had found that simple interest at the rate of 1 per cent. per mensem was a fair commercial rate in the absence of special circumstances justifying a higher rate—whehter that is a quotation from the judgment of the Subordinate Judge or whether it is a summary of it does not appear from the report—and thereupon, considering that the lender had not proved that there was any necessity to borrow at the rate of interest stated in the mortgage deed, the Board was content once more to adopt the conclusion of the Indian Court as an authority better qualified to know what was proper in India than their Lordships themselves, in spite of the fact that in that case also the Subordinate Judge had had before his mind S. 16 of the Contract Act and not the question of the kartas' authority, which had been the basis of the argument at their Lordships' Bar.

Up to that point no attempt was made in these cases to discriminate between rate of interest, simple or compound interest, and rests. The decision of the Indian Court had been in favour of simple interest, and it was adopted without comment by their Lordships.

A slightly different point has been made upon the third case *Radha Kishun* v. *Jag Sahu* (2). Here the mortgagor was a Hindu widow. The mortgage stipulated for 34 per cent.

2. (1924) L R 51 I A 278 : I L R 4 Pat. 19 ; 47 M L J 329 (P C).
3. (1922) L R 50 I A 14 : I L R 2 Pat. 285 : 44 M L J 615 (P C).

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compound interest with half-yearly rests, and when Lord Dunedin deals with this he says at page 281, in the passage already shortly referred to :—

"But, when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. For these reasons their Lordships are of opinion that the judgment of the High Court cannot be supported on the grounds given."

Pausing there, one must remember that the question of compound interest cannot be regarded as entirely separable from the rate of interest. Compound interest at a moderate rate may not necessarily be oppressive and similarly compound interest with infrequent rests may not be oppressive, where compound interest coupled with a high rate of interest and with frequent rests might be in excess of any authority which the kartas could have. The whole conditions and terms of the lending have to be regarded together. When Lord Dunedin proceeds to say:

"It is evident on the face of the document that the interest charged is far in excess of commercial rates,"

this is a decision, which applies to the particular borrowing which was before the Board in that case and does not lay down a general rule with regard to all instruments or in particular with regard to the present one. Then he goes on:

"The plaintiffs' Counsel urged that if this view should prevail the judgment of the Subordinate Judge should not be restored *simpliciter*, but the case should be remitted for further enquiry, and he called attention to the fact that certain evidence proffered was refused by the Subordinate Judge as unnecessary, and that a petition of the High Court for allowance of this evidence was not dealt with, as in view of the finding of the High Court it became unnecessary to deal with it. Now the evidence in question consisted of the production of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds and the tender of a witness to speak to the execution of one of the bonds. Their Lordships do not think that a remit is necessary. Evidence simply that on one other occasion the widow had borrowed at high interest is not in any way conclusive as to what she might have done on the occasion in question, and as no other evidence was tendered their Lordships think that the Subordinate Judge was justified in saying as he did that 'there is no evidence adduced by the plaintiffs to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 24 per cent. with a six-monthly rest'."

That passage has been relied upon for the purpose of making out the contention that as the evidence here consists of other borrowings by the same kartas a year or two previously, with proof of the execution of the bonds *non constat*

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that these kartas in the previous cases may not have acted as much in excess of their authority as in the present case. *Non constat* also that the same rate of interest obtained on another bond by the same party and even though judicially decreed would apply, to bind others. It might be evidence of the pressure of necessity on the actual borrower herself, but it would not also be evidence to show that in another transaction it was a proper rate and terms binding upon other parties. Their Lordships do not consider this to be the meaning of Lord Dunedin's judgment. The application made was that the Board should not either adopt the conclusion of the Indian Court or treat the case as one in which no evidence had been given, but should send it back in order that evidence might be given which had been, as it was said, wrongly left out of account. The Board considered that the Subordinate Judge was justified in treating the evidence as such that, if given, it would not have influenced his mind, but this depended on what the evidence was and who gave it, and could not be a guide in future cases. They declined, indeed, to give the lender a further opportunity of getting the same or another Judge to accept it, but they did not lay down the rue that where a borrower has previously borrowed under other instruments, but on similar onerous terms, this cannot be evidence that the borrowing on the occasion in question was a reasonable and proper transaction. Their Lordships therefore think that the argument fails in so far as it is directed to show that on that authority the evidence given in this case was not sufficient.

The remaining observation is this. In all the cases cited the Board, instead of presuming in default of evidence to lay down for itself that judicial notice should be taken of terms of borrowing and rates of interest, which would be within the authority of a particular karta somewhere in India, was content, in each case, to acept the decision of the local Court as being at any rate better informed on such a subject than their Lordships can be. In the present case, their Lordships have a decision of the local Court. It is quite true that the decision on this occasion is the other way. The local Court has given its decision upon the evidence, and has not reduced either the terms or the rate, but their Lordships can see no reason why the importance of the experience of the Indian Court in supplying their Lordships' lack of knowledge is not equally great in the one case as in the other. There is no rule, which their Lordships can discover, which binds them, when the terms of a loan are challenged, to lean to their reduction, or to presume that

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simple interest must always be judically preferable to compound interest, or that rates, because they might seem high here, must be unreasonable in India. Compound interest is common and may often be necessary and proper in India under the circumstances of that country. The matter is not one upon which, one way or the other, their Lordships' Board has ever decided that there is a presumption one way. Accordingly, their Lordships think that, even if evidence had not been given, they would be acting strictly in accordance with the previous cases in declining to take it upon themselves to decide the rate and terms of interest, and in holding that they sholud accept the decision of the Subordinate Judge.

For the purposes of the point in question there is no substantial difference between his finding—that the terms are not hard, unconscionable or penal—and a finding that they were reasonable commercial terms, as their Lordships understand the expression, but they hold further, in view of the evidence that was given, which they can see no reason for disregarding, that enough was proved to discharge the onus of proof, and to justify a decree in favour of the mortgagees when no evidence in answer was given.

Their Lordships will humbly advise His Majesty that this appeal should be dismiseed with costs.

Solicitors for appellants : *Nicholson, Graham* and *Jones.*

Solicitors for respondents : *Watkins* and *Hunter.*

K. J. R. *Appeal dismissed.*

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT*:—SIR MURRAY COUTTS TROTTER, KT., *Chief Justice,* MR. JUSTICE WALLACE AND MR. JUSTICE BEASLEY.

F. B.

The Commissioner of Income-tax, Madras v. Somasundaram Chettiar

The Commissioner of Income-tax, Madras ... *Referring officer**

v.

M. T. T. K. M. M. S. M. A. R. Somasundaram Chettiar ... *Assessee*

Indian Income-tax Act (XI of 1922), S. 10 (2) (iii)—Banking business at places within British India and at a place outside British India—Head office within British India—Money borrowed at head office—Part of the borrowings remitted to the place outside British India and used as

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capital there—Interest paid on this amount, if allowable as deduction in computing the assessable income of the business in British India.

A Nattukkottai Chetty carried on banking business at various places of which Madras, which was his head office, was one place and Ipoh, a place in the Federated Malay States, was another. Money was borrowed by him in Madras, and part of it was sent out to Ipoh and was used as capital in the conduct of the Ipoh business. The Chetty who was assessed to Income-tax in respect of the income from the business in British India claimed that the interest paid by him on such sums of borrowed money as were remitted for capital to the Ipoh branch should be deducted from the assessable income.

Held that, under S. 10 (2) (iii) of the Indian Income-tax Act, the amount that can be deducted is only the interest paid on the capital borrowed for the purposes of the business whose profits are being assessed to taxation and that consequently the interest paid on the amounts borrowed and remitted to Ipoh is not an allowable deduction in computing the assessable income.

Obiter: The words "capital borrowed for the purposes of the business" in S. 10 (2) (iii) of the Indian Income-tax Act must be construed as meaning capital borrowed and used for the purposes of the business.

Case stated under S. 66 (3) of Act XI of 1922 by the Commissioner of Income-tax, Madras, for the decision of the High Court.

2. The petitioner, Somasundaram Chettiar, is a banker carrying on business at Madras, Devakottai, Thonze (Burma) and Ipoh (Federated Malay States). The businesses at these places are distinct, and separate accounts are maintained for each of them. The business at Madras is admittedly conducted with borrowed money, the petitioner having no capital of his own at that place. Some borrowed money is also utilised in financing the Thonze and Ipoh businesses. The petitioner is treating the money invested in his Thonze and Ipoh businesses as 'loans' advanced by him, and in ascertaining the profits or gains of his Madras business he takes credit for the interest due to him on these "loans." For the assessment of the year 1925-26, based on the income derived by him during the Tamil year Rakthakshi (13—4—1924 to 12—4—1925), the petitioner returned his income as Rs. 22,361 as follows:—

Business :	Madras	...	Rs.	1,543
	Thonze	...	„	23,578
				25,121
	Devakottai loss	...	„	2,760
	Net Income	...	„	22,361

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His accounts were called for and examined. Those relating to the Madras business showed that in arriving at the profits of the business the petitioner did not take credit for the interest due from his Ipoh business, though he took credit for the interest due from Thonze. On the other hand the petitioner claimed a deduction of Rs. 34,672 as interest paid on sums borrowed by him in Madras which included sums advanced by him to his business at Ipoh. The capital sum due by Ipoh amounted to Rs. 60,342 at the end of the year of account. In the cirsumstances two courses were open to the Income-tax Officer: either (1) to include the interest due from Ipoh but not taken credit for by Madras as interest received from Ipoh (in fact the Ipoh accounts showed that the interest due to Madras —Rs. 6400—was paid by adjustment in the year of account 1924-25, though the Madras shop took credit for it in the subsequent year), or (2) to disallow part of the interest paid by Madras on moneys borrowed by it in the proportion that the sums advanced to the Ipoh business bore to the total borrowed capital. The Income-tax Officer adopted the latter course and computed the interest so paid on behalf of the Ipoh business at Rs. 5,427. He disallowed the interest payment to that extent and fixed the profits of the Madras business at Rs. 9,729. To this the Income-tax Officer added the other income of the petitioner and assessed him as under:—

Business :	Madras	Rs.	9,729
	Thonze	...	24,117
			33,846
	Devakottai loss	...	1,542
			32,304
	Property	...	416
	Taxable income	...	32,720

The profits and gains derived by the petitioner from his business at Ipoh were not taken into account in the assessment as they were not found to have been received in British India.

The petitioner appealed to the Assistant Commissioner and contended that the sum of Rs. 5,427, disallowed by the Income-tax Officer in arriving at the profits of his Madras business, should be allowed as a deduction. The Assistant

Commissioner held that the Income-tax Officer was right in disallowing the payment when arriving at the profits of the Madras business and dismissed the appeal. A copy of his order is filed, marked Ex. A.

The petitioner then applied to my predecessor under S. 66 (2) of the Income-tax Act and required him to refer certain questions for the opinion of the High Court. This the Commissioner refused to do on the ground that no question of law arose. A copy of his order, dated 29th April, 1926, is filed, marked Ex B.

Thereupon the petitioner moved the High Court, under S. 66 (3) of the Income-tax Act, and the High Court, in its order quoted above, has required me to refer the following two questions :—

(*i*) Whether the operation of S. 10 (2) (iii) is excluded merely because the capital borrowed is also utilised in foreign business:

(*ii*) Whether the construction put on S. 10 (2) (iii) by the Income-tax authorities is not too restricted.

3. *Question* (*i*) :—I am of opinion that under S. 10 (2) (iii) of the Income-tax Act, an assessee is not entitled to claim a deduction of the interest paid on sums borrowed by him when the business for which he uses these sums is not the subject of assessment. Under S. 10 (1) the tax is payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him. Under sub-section (2) of that section such profits or gains are computed after making the allowances referred to therein, one of which is "in respect of capital borrowed for the purposes of the business......the amount of the interest paid"—sub-clause (iii). The term "the business" occurring in this sub-clause means the business, the profits and gains of which are liable to pay tax under S. 10. The only point for consideration then is whether all the money borrowed by the petitioner and shown in his Madras books was used in furtherance of the business carried on in Madras, the profits of which alone have been taxed. This has been found by the Income-tax authorities against the petitioner. The money borrowed in Madras was not wholly utilised for the Madras business. A part of it was used in Ipoh business. If it had been necessary to compute the Ipoh profits with a view to taxing them as profits received in British India, interest paid on capital utilised at Ipoh would have been brought into the computation.

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But in this assessment no such computation has been made and the Ipoh profits have not been taxed.

4. *Question (ii)* :—I do not consider that the interpretation put upon S. 10 (2) (iii) is too restricted; it appears to me to be the natural and equitable construction. When a man conducts two businesses, the profits of each business should be computed separately having regard to the capital employed in that business. He cannot be allowed to show a reduced sum as the profits of one business by debiting to that business the interest on capital borrowed for the purpose of the other business. On any other view an assesseee who borrows money in British India and uses it partly in his British Indian business and partly in his foreign business would be able to set off the whole of his interest payments against his British Indian profits. The profit earned in British India would thus escape taxation, either wholly or in part, while the foreign profits, which by the use of this device would be artifically swelled, could only be taxed if they were so treated as to fall within the purview of S. 4 (2); which the assessee, in the hypothetical case mentioned, would naturally avoid doing if possible.

M. Patanjali Sastri for the Referring Officer.

K. S. Krishnaswami Aiyangar and *R. Kesava Aiyangar* for the Assessee.

The judgment of the Court was delivered by

Coutts Trotter, C. J.

The Chief Justice :—In this case there was carried on a business by a Nattukkottai Chetti at various places of which the only two relevant ones are Madras, where his head office was, and Ipoh, a place in the Fedrated Malay States. The short point is this. Money was borrowed by the assessee in Madras and of course interest has to be paid on it in Madras. Part of that money—it does not matter how much because that is a question of fact for the Commissioner who has found a figure—was in effect sent out to Ipoh and was used as capital in the conduct of the Ipoh business. Apparently in all the businesses this gentleman relied on borrowed capital and not his own. Deductions are claimed in this case in respect of the interest paid by the assessee to the persons from whom he borrowed his capital and the Commissioner has given effect to these deductions so far as they affect the branches in British India, but he disallowed the deduction in respect of the interest paid on such sums of money as were remitted for capital to the Ipoh branch, a sum in all of Rs. 60,000.

ment of the Court of the Sub-divisional 1st Class Magistrate of Pattukottai in C. C. No. 63 of 1926.

Kader Batcha Saheb, *In re.*

S. Muthiah Mudaliar for petitioners.

The Public prosecutor for the Crown.

The Court made the following

ORDER :—The first point urged in this revision petition is that the Magistrate inspected the scene of occurrence without notice to the accused. The Magistrate in his report says that he informed the vakils of his intention to inspect the place and the accused was present at the time of the inspection. There is nothing in this ground.

The next point is that the Magistrate has imported into the case impressions received by him at the time of inspection. A Magistrate is entitled to inspect a place in order to understand the evidence. But if he receives an impression which is in favour of one side or the other, he should give an opportunity to the side against which he forms an impression to explain away if possible the impression created in his mind by the inspection. In this case the whole question turned upon there being an entrance or not. The impression that the Magistrate received at the inspection was that the entrance was an old one, for in his opinion it was made up of old materials which he thought must have been there long. The old materials could have been put in there seeing that the Magistrate was going to inspect the place and that would not be a sufficient gound for holding that the entrance was an old one. He should have in fairness to both sides asked them to say how long the materials were there and why the materials were old. I think this view of the impression received by the Magistrate has influenced him in accepting the evidence for the presecution as true. The learned Magistrate ought not to have allowed the impression created in his mind to greatly weigh in considering the evidence in this case. The impression received at the time of the inspection has vitiated the appreciation of the evidence in the case. Therefore I set aside the conviction, and as this is a very trivial case, I do not think it is necessary to order a re-trial. The fine if paid will be refunded to the petitioners.

N. S.

Petition allowed and conviction set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Komaragiri Bitchalugadu ... *Accused in Calender Case No. 46 of 1927 on the file of the Sub-divisional Magistrate of Narasaraopet.*

Bitchalugadu, *In re.*

Criminal Tribes Act, VI of 1924—S. 24-b—Conviction under—Legality—Proof necessary for.

Where the only evidence against an accused, who had been convicted under S. 24-*b* of the Criminal Tribes Act, VI of 1924, was that he was found near a pond and that he had a pair of scissors and a box of matches, *held* that the conviction could not be sustained.

The facts proved do not make out that the accused was waiting for an opportunity to commit theft or robbery within the meaning of the section.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Sessions Judge of Guntur in his letter, dated 22nd August, 1927.

The Public Prosecutor for the Crown.

Assused not represented.

The Court made the following

ORDER :—This is a reference by the Sessions Judge of Guntur, recommending the quashing of the conviction of the accused under S. 24-*b* of the Criminal Tribes Act, VI of 1924. Under S. 24-b, if a member of a registered criminal tribe is found in any place under such circumstances as to satisfy the court that he was waiting for an opportunity to commit theft or robbery he shall be punished with imprisonment for a term which may extend to three years, *etc.* All the evidence against the accused is that he was found near a pond and that he had a pair of scissors and a box of matches. I do not think this would in any way amount to an offence under S. 24-*b*. As the Sessions Judge has rightly remarked, the facts proved do not make out that the accused was waiting for an opportunity to commit theft or robbery. I therefore set aside the conviction and sentence of the accused and direct his immediate release if he has not been already released.

A. S. V. *Conviction set aside.*

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*Crl. R. C. No. 657 of 1927. (Case Referred No. 50 of 1927). 11th November, 1927.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

Bodapati Adenna ... *Petitioner—Appellant** (1*st Respondent*—1*st Counter-—pctr.-Plaintiff*).

v.

Bodapati Chinna Ramayya (dead) and five others ... *Respondents in both.*

Bodapati Adenna *v.* Bodapati Chinna Ramayya.

Civil Procedure Code, O 21, R. 89—Sale of immoveable property subject to a lease—Right of lessee to apply to have the sale set aside—Right of trespasser.

A lessee subject to whose lease immoveable property has been sold in court auction can apply under O. 21, R. 89 of the Civil Procedure Code to have the sale set aside.

Quare, whether a trespasser in possession of the property sold in court auction has an 'interest' which will allow him to apply under O. 21, R. 99 of the Civil Procedure Code to have the sale set aside?

Potti Nayakar v. *Suppammal*, (1922) 20 L. W. 31, referred to.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Bapatla in C. M. A. No. 14 of 1924, and the appeal against the said C. M. A. No. 14 of 1924 of the said Court of Bapatla preferred against the order of the Court of the Principal District Munsif of Ongole in C. M. P. No. 647 of 1923 in O. S. No. 712 of 1922.

P. Venkataramana Rao for appellant in C. M. S. A. No. 25 of 1925 & Petr. in C. R. P. No. 326 of 1925.

V. S. Narasimhachariar for respondents in both.

The Court delivered the following

JUDGMENT :—The question for our decision in this C. M. S. A. (with which has been filed a C. R. P.) is whether a lessee, subject to whose lease immoveable property has been sold in court auction, can apply under O. 21, R. 89 of the Civil Procedure Code, to have the sale set aside. The District Munsif dismissed the application but it was allowed by the Subordinate Judge on appeal.

Rule 89 of O. 21 runs as follows:

"Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by

*C. R. P. No. 326 of 1925 and C M S A No. 25 of 1925. 11th August, 1927.

Bodapati Adenna v. Bodapati Chinna Ramayya.

virtue of a title acquired before such sale, may apply to have the sale set aside"

upon complying with certain conditions. The argument addressed to us is twofold :

(*a*) that a lease obtained before a sale is not an 'interest' held in the property 'by virtue of' a title acquired before such sale; and

(*b*) that the property sold excluded the lessee's right and therefore that the lessee cannot be said to have an interest in that property.

According to S. 105 of the Transfer of Property Act, a lessee is a transferee of a right to enjoy the property leased, and there is enough authority [see *Secretary of State for India* v. *Karuna Kantha Chowdhry* (1) and *Mohipal Singh* v. *Lalji Singh* (2)] for the position that a lease amounts to a transfer of interest in the property, and, if there was a transfer of interest, there was, as the rule also requires, "title acquired." In *Potti Nayakar* v. *Suppammal* (3), Venkatasubba Rao, J., went so far as to express the view that even a trespasser has an interest which would allow him to come under this rule, a view which was dissented from by the other learned Judge who composed the Bench, Oldfield, J. It is unnecessary for us to offer an opinion upon this point, and we mention the case rather because the view is expressed in it that a lessee may apply, an opinion also to be found in the judgment of Ameer Ali, J., in the Calcutta Full Bench case, *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (4). We can see no good reason why, if a mortgagee has an interest which enables him to apply, a lessee should not equally have an interest.

(*b*) The argument under this second head virtually amounts to this, that the rule does not bear what appears to be its plain meaning and that in the term "interest" is comprised only the right, title and interest of the judgment-debtor which is sold and not any other interest subject to which the sale takes place. The corresponding provision in the Code of 1882, S. 310 (*a*) has the words "Any person whose immoveable property has been sold," and it can hardly be questioned that the language in the present rule is of a wider scope. Neverthless it was held by the Full Bench in *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (4) that under the old wording a mortgagee

1. (1907) I L R 35 C 82, at p. 99 (F B).
2. (1912) 17 C W N 166. 3. (1922) 20 L W 31,
4. (1901) I L R 29 C 1 (F B).

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was a person who could apply, although, no doubt, that decision proceeded on the footing that the auction purchaser would be in a position to annul the mortgage. Although it is not expressly so stated, the judgments of the learned Judges who composed the majority in that case do give some ground for the inference that the application could be made because the mortgagee's was a right which might be affected by the sale. But that decision is not upon the language of the rule as it now stands, and we cannot avoid the conclusion that Mookerjee, J., when in *Dulhin Mathura Koer* v. *Bangsidhari Singh* (5) he construed the rule as relating only to a person whose interest would be "affected", in the strictly legal sense of that word, by the sale, read into it something which it does not contain and which might have been clearly expressed if it had been intended so to restrict it. Whatever may have been the reason for amending the phrasealogy, we think that, as the rule stands, the word "property" must mean the tangible property sold, whether or not persons other than the judgment-debtor have any interest in it, and that it does not mean merely the right, title and interest of the judgment-debtor alone. This is clearly the meaning which must be given to the word "property" in Rr. 62 and 91 of O. 21, and it is the meaning which Krishnan, J., attached to it in *Kandaswami Asari* v. *Swaminatha Stapathi* (6). Any more restricted meaning would apparently limit resort to the rule to the judgment-debtor or to one of several joint judgment-debtors and would make it inapplicable in the very unusual case of a mortgagee decree-holder applying to have the sale under his own decree set aside. Its application to the case of a sale free of a prior mortgage could hardly arise, as, under R. 12 of O. 34, the consent of the prior mortgagee is necessary to that course. We think accordinly that there are no sufficient grounds to limit the application of the rule in the manner suggested but rather that its purpose is to include among those who can apply such persons as mortgagees and lessees of the property, who may be concerned to avoid a transfer of the judgment-debtor's title although their own interest may not be 'affected', using that word in its strictly legal sense. Accordingly we confirm the order of the Subordinate Judge and dismiss the C. M. S. A. and the C. R. P., the latter with costs.

N. S. *Appeal and Revision Petition dismissed.*

5. (1911) 15 C L J 83. 6. (1919) 10 L W 556.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Vitta Venkatachalam and another ... *Petitioners** (*Counter-Petrs.-Pltfs.*)

v.

Sivapuram Subbayya ... *Respondent* (*Petr.-Deft.*).

Vitta Venkatachalam v. Sivapuram Subbayya.

Limitation Act—Article 164—Duly served—Meaning—Personal service if necessary—Substituted service if enough—Ex parte decree—Application to set aside—Onus on applicant.

Substituted service within the meaning of the Code of Civil Procedure is not due service within the meaning of Article 164 of the Limitation Act.

"Duly" in Article 164 is not equivalent to personally. Service on any male member of the defendant's family in the defendant's absence is due service within the meaning of Art. 164; so is service on an agent or on a servant under circumstances indicated in O. V of Civil Procedure Code.

A defendant who applies to set aside a decree passed against him *ex parte* must establish that the summons in the suit was not duly served on him

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Kurnool, dated the 31st day of January, 1927, and passed in Miscellaneous Appeal Suit No. 30 of 1926 (preferred against the order of the Court of the District Munsif of Markapur in C. M. P. No. 195 of 1926 in O. S. No. 4 of 1925).

P. C. Parthasarathy Aiyangar for petitioners.

L. A. Govindaraghava Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is a Civil Revision Petition filed by the plaintiff in respect of an order made by the District Judge of Kurnool on appeal by the defendant against an order made by the District Munsif of Markapur. On application by the defendant the District Munsif refused to set aside the decree passed against him *ex parte*. The District Munsif dismissed the application holding that the summons in the case had been duly served within the meaning of Article 164 of the Indian Limitation Act and that therefore the application to set aside the decree passed *ex parte* more than 30 days from that date did not lie. The service which the District Munsif held to be such due service within the meaning of Article 164 was substtuted service of summons ordered by the court. As the defendant's application to set aside the decree was dismissed, he appealed, and, on appeal, the learned District Judge reversed the

*C. R. P. No. 375 of 1927. 3rd October, 1927.

Vitta Venkatachalam v. Sivapuram Subbayya.

order of the District Munsif, as I find, mainly on the ground that there was no satisfactory proof before the District Munsif of the substituted service ordered by the Court. It seems to me that in this matter the learned District Judge was clearly wrong. It is on the applicant, who wants the decree passed against him *ex parte* set aside, to establish that the summons in the suit was not duly served on him, and for the purpose of establishing it he would certainly be entitled to allege and prove that there was no service at all as ordered by the Court and that, even assuming that a substituted service could be regarded as due service for the purpose of Art. 164, no such substituted service as ordered by the Court was as a matter of fact effected. The petition of the defendant for setting aside the decree passed *ex parte* has been read in Court. There is no allegation there with regard to summons not having been effected by substitued service as ordered. Therefore the fact of effecting the substituted service was not really put in issue, and, though Mr. Govindaraghava Aiyar tried to show from a reading of the judgment of the District Munsif that it was put in issue, I am satisfied that the only matter that was argued before the first court was whether substituted service was due service under the article. Seeing therefore that the Lower Appellate Court has reversed the order of the District Munsif on the ground which was not really taken or put in issue in the first court and in spite of the finding clearly indicated in the judgment of the District Munsif that substituted service was effected, I should have been prepared to hold that it did sufficiently raise the question of jurisdiction to justify this Court interfering on revision. But the next question is whether having regard to the other circumstances in the case I am called upon to do so. The ground on which the District Munsif held that the petitioner was duly served was that substituted service was ordered against him on proper grounds and that substituted service was effected. I am unable to see why the learned District Munsif, while referring to the tender of summons previously to the defendant and his refusal to accept the same as recorded, I take it, on the summons issued by the Court, did not proceed to find whether there was in fact such a tender and refusal and why that was not proper service in law. My difficulty however in that matter is enhanced by the fact that the Lower Appellate Court apparently came to the conclusion as a fact that there was no satisfactory proof of such tender or refusal It is very much to be regretted why, in the face of the evidence

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apparently given by the petitioner-defendant that he was not aware of the suit or any proceedings therein, the plaintiff-decree-holder did not adduce even the evidence of the bailiff who made such tender and made the endorsement thereon. The plaintiff has himself to thank if he did not produce before the Court satisfactory evidence to rebut the case of the petitioner that he had no knowledge of the suit or proceedings therein. However I should have been then disposed to interfere and set aside the order of the lower appellate court if I had been satisfied that the order made by the learned District Munsif was right and that it should be restored in the interests of justice. For the purpose of my decision I must take it that no previous tender or refusal of the summons had been proved. If so, the only question is whether substituted service within the meaning of the Procedure Code is due service within the meaning of Article 164 of the Limitation Act. The learned vakil for the petitioner has drawn my attention to two judgments of this Court ; one is in the case of *Narasimha Chettiar* v. *Balakrishna Chettiar* (1). In that case undoubtedly as pointed out by the learned vakil for the petitioner, Mr. Justice Madhavan Nair, sitting as a single Judge, came to the conclusion that in the case of substituted service, summons is duly served for the purpose of Art. 164 even though it does not in fact come to the defendant's knowledge. Of course, we are not now concerned with the question of knowledge. With all respect to the learned Judge I am unable to agree that service of summons by substituted service under order of Court could possibly be regarded as due service for the purposes and within the meaning of Art. 164 of the Limitation Act. The result of so holding would undoubtedly be that in no case in which a defendant is served according to any of the rules of the Procedure Code could it ever be held that there was no due service. Unless it is shown by the defendant that there was no service at all really effected as the records show and that entries or endorsements were mere forgeries or fabricatons, no defendant can ever establish that the summons in the suit was not duly served. The learned vakil for the petitioner has also drawn my attention to another case *Doraiswami Aiyar* v. *Balasundaram Aiyar* (2), where Mr. Justice Wallace also, sitting as a single Judge, held that the word 'duly' in Art. 164 is not equivalent to 'personally'. I agree that the word 'duly' does not mean 'personally'. The

1. (1926) 52 M L J 512. 2. (1926) 52 M L J 477.

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learned Judge was undoubtedly right when he decided that the lower appellate court in the case before him was wrong into launching on any investigation of the propriety of the substituted service ordered by the court, and it seems to me that that was the ground on which the learned Judge held that the lower appellate court had no jurisdiction. Another case not reported was also referred to by the learned vakil for the petitioner, the judgment of Waller and Madhavan Nair, JJ., in C. M. A. No. 348 of 1925. In that case, the question was whether the service by affixture to the outer door when there was no agent of the defendant or male member on whom the summons can be served was proper service, and it was held that that was due service within the meaning of the article. The question in this case is not however whether service of the summons on the defendant in any of the various manners indicated in the provisions of the Civil Procedure Code, O. 5, relating thereto is or is not due service, but whether substituted service is due service. I am prepared to hold that, for instance, if the defendant should be absent, service on any male member is undoubtedly due service; so is service on an agent or on a servant under circumstances indicated in O. 5 and so on. But when it comes to a question of substituted service, it seems to me that the very expression 'substituted service' clearly and conclusively indicates that it is not due service, the service that is due to the defendant or that is due according to the provisions of law for the purpose of service. For the purpose of Article 164, substituted service therefore could not possibly be regarded as due service. I do not at all see why, adopting such a construction as Mr. Justice Madhavan Nair appears to have done, the Article 164 should be whittled down in the manner it would undoubtedly be. I do not for my part believe that the legislature really intended in enacting the third column of Article 164 to confine the scope of the section only to cases where the actual service directed by the court is shown not to have been effected at all in that manner. We may also have regard to what is obviously the object of the legislature in providing that in cases where the summons is not duly served the time begins to run from the date on which the applicant has knowledge of the decree. The implication seems to be clear that in cases where the summons is duly served the presumption may well be that he has knowledge of the decree, or at any rate if he does not get knowledge of the decree, it was ascribable only to some fault on his part or on the part of those near about him who ought to have known better. I am there-

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fore unable to agree with the view taken by the District Munsif that substituted service of summons within the meaning of the Procedure Code is due service within the meaning of Article 164. The District Munsif has not found that there was any other kind of due service. If therefore in this case I should have been satisfied that the order of the District Munsif which was set aside on appeal by the learned District Judge was itself wrong, I should have been prepared to interfere and set aside the order of the District Judge, because I am not satisfied with the grounds on which the learned District Judge has reversed the order of the District Munsif. But as I have come to the conclusion that the order of the District Munsif was wrong and that in my judgment the proper order has somehow come to be made by the District Judge, I do not feel called upon to interfere with it. The petition is therefore dismissed, but in the circumstances I make no order as to costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Ibrahim Sahib ... *Petitioner* (Respondent-Deft.).*

v.

Achi Thayarammal ... *Respondent (Petitioner-Plaintiff).*

Ibrahim Sahib v. Achi Thayarammal.

Civil Procedure Code, O 9, R. 9.—O. 47, R. 1—S. 151—Ex parte decree—Application to set aside—Money deposited in court pursuant to—Application by plaintiff for payment out of—Nature of—Dismissal of application for default—Restoration—Jurisdiction

An application by a decree-holder for the payment out to him of money in court which was not realised in execution of the decree but which was paid in by the defendant when he applied for setting aside the *ex parte* decree against him is not an execution application or an application in execution proceedings. When such an application has been dismissed for default, the court has jurisdiction to restore it.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Negapatam in I. A. No. 754 of 1925 in S. C. S. No. 779 of 1918.

K. S. Desikan for petitioner.

K. Raja Aiyar for respondent.

The court delivered the following

JUDGMENT :—It is urged that the Subordinate Judge had no jurisdiction to restore to file an application made in the

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*C. R. P. No. 1396 of 1925. 18th October, 1927.

Ibrahim Sahib v. Achi Thayarammal

course of execution proceedings and therefore the order of the Subordinate Judge is *ultra vires*. The respondent made an application for execution which was dismissed on the 24th July, 1925. Before the dismissal of that petition, the petitioner applied for setting aside an *ex parte* decree passed against him and paid into court the decree amount. The day after the withdrawal of the execution petition by the respondent, the petitioner's vakil withdrew the petition for setting aside the *ex parte* decree, as he thought that the decree in favour of the respondent had been barred by limitation. On the same day, 25th July, 1927, the respondent applied for payment of the amount in court to him. The Subordinate Judge dismissed this application for non-appearance on 17th October, 1925, and he restored it on 23rd October, 1925. The question is whether this application for payment out was an application in execution. The contention of Mr. Desikan is that as much as it was made after the passing of the decree in the suit this must be considered to be an application in execution and that the decision in *Chenchayya* v. *Pichi Reddi* (1) governs the case. I am unable to uphold the contention that all aplications made after the passing of a decree are necessarily applications in execution or execution applications. The money in court in this case was not realised in execution of the decree. It was paid in by the petitioner when he applied for setting aside the *ex parte* decree. That being so, the application of the respondent for payment of the money cannot be said to be an execution application or an application in execution proceedings so as to come within the principle of the decision in *Chenchayya* v. *Pichi Reddi* (1). I hold that the Subordinate Judge had jurisdiction to restore the application to file.

There is no other point in this case.

The petition is dismissed with costs.

A. S. V. *Petition dismissed*

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1. (1926) 52 M L J 153.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS

The Cannanore Municipal Council through its Chairman Rao Sahib K. Chantan Avl. ... *Petitioner** *(Defendant)*

v

Puthiya Valappil Kuniyil Anandan ... *Respondent (Pltf.)*.

The Cannanore Municipal Council. v Kuniyil Anandan.

Madras District Municipalities Act, Schedule V, clause (q)—Machinery—Hand looms worked with the hand, if.

Hand looms which are worked without steam power or electric power but only with the hand cannot be called machinery within the meaning of clause (*q*) of Schedule V to the District Municipalities Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the court of the District Munsif of Cannanore in S. C. S. 1183 of 1925.

N. Govindan for petitioner.

M. C Sridharan for respondent.

The court delivered the following

JUDGMENT :—The only point in this Civil Revision petition is whether hand looms are machinery within the meaning of schedule V, clause (*q*) of the District Municipalities Act. The Municipality of Cannanore assessed the respondent in respect of two builidings belonging to him in which he had a number of looms. He paid the assessment and afterwards filed a suit in the District Munsif's Court for the recovery of the amount on the ground that it was illegally levied from him. The District Munsif gave a decree to the plaintiff, and the Municipality has preferred this revision petition.

The only question for consideration is whether hand looms are machinery within the meaning of clause (*q*) of Schedule V. The contention of Mr. Govindan for the petitioner is that it is machinery, or, even if it is not to be treated as such, the Municipality having *bona fide* assessed the respondent and having complied with all the formalities required by the Act, the respondent is not entitled to get back the amount paid by him. The question in this case is not whether the Municipality has complied with the law, but whether it can levy an assessment in respect of hand looms which do not come within the meaning of clause (*q*). I do not think that hand looms which are worked without steam power or electric power but only with

*C. R. P. No. 542 of 1926. 9th November, 1927.

The Cannanore Municipal Council. v. Kuniyil Anandan.

the hand can be called machinery within the meaning of clause (q). If the hand loom is machinery then it might be contended with some show of reason that the charka and Singer's sewing machines are machinery. I do not think it was ever the intention of the legislature that small hand looms and industrial impliments and tools should be assessed under the Act. Mr. Justice Jackson in a recent case held that looms were not machinery.

In the view I take of the word 'machinery' I do not think the Municipality was justified in levying the assessment. The judgment of the lower court is correct and the Civil Revision Petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Ramachandra Upadya and another ... *Petitioners** (*Petrs.*)

v.

Srinivasa Tantri and another ... *Respondents* (*1st and 3rd respondents—Decree-holder and Purchaser*).

Ramachandra Upadya v. Srinivasa Tantri.

Civil Procedure Code of 1908—O. 21, R 89—Hindu Law—Joint family—Member of—Sale of share of, in execution—Right of another member to deposit amount and to apply to set aside sale.

When the share of one of several brothers constituting a joint Hindu family is sold in execution, another brother can deposit under O. 21, R. 89, Civil Procedure Code, as a person holding an interest in the property sold.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Kanara, dated 12th December, 1925, and passed in C. M. A. No. 19 of 1925 (R. E. A. No. 183 of 1925, R. E. P. No. 1216 of 1924 on the file of the Court of the District Munsif of Kundapur in O. S. No. 454 of 1924 on the file of Udipi District Munsif's Court).

B. Sitarama Rao for petitioners.

K. Y. Addiga for respondents.

The court delivered the following

JUDGMENT :—The question for determination is, whether, in a joint family, when the share of one brother is sold in execution, another brother can deposit under O. 21, R. 89 of the Code

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* C. R. P. No. 1062 of 1926. 25th November, 1927.

Ramachandra Upadya v. Srinivasa Tantri.

of Civil Procedure, as a person holding an interest in the property sold. It is held in *Rottala Runganadhan Chetty v. Pulicat Ramasami Chetty* (1) that every member of an undivided family has an interest in joint family property, that is to say, not the share of each, but the whole corpus of the property. Then if such member prefers to pay another member's debts rather than see the ancestral property pass to strangers (a transaction which may easily involve the family in discredit and inconvenience) there is no objection to his doing so. The petition is allowed with costs throughout; if petitioner pays the deposit within two weeks of receipt of this order, it may be accepted.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Sayyad Abdul Sathar ... *Petitioner** (*1st accused in C. C. No. 38 of 1926 on the file of the Sub-divisional Magistrate of Vellore*).

Abdul Sathar, *In re*

Indian Penal Code—S. 366—Offence under—Forcing or seducing for purpose of illicit intercourse—Element of—Necessity—S. 361—Enticing—Taking—Meaning—Taking of minor girl from her husband's house—What constitutes—Evidence necessary—Minor offence—Trial by Magistrate for—Facts disclosing major offence not triable by him—Trial, if illegal—Interference in revision in case of.

In the absence of any element of forcing or seducing for the purpose of illicit intercourse, no offence under S. 366, Indian Penal Code, can be regarded as possible.

The trial by the Magistrate of an accused for a less serious offence when the facts disclose a more serious offence which is beyond his competence is not illegal, and the High Court is not bound to interfere in revision in such a case.

Meaning of 'Enticing' and 'taking' in S. 361, Indian Penal Code.

Where the evidence disclosed that, but for something which the accused consented to do and did ultimately, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house held that there was sufficient taking in law for the purposes of S. 363, Indian Penal Code.

From the facts that a minor girl was desparately calling for the accused to come and take her away from her husband's house, and that she was soon after discovered to be with the accused or under his control,

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*Crl. R. C. No. 63 of 1927. 6th May, 1927.
(Crl. R. P. No. 55 of 1927)

1. (1903) I L R 27 M 162.

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it is open to a court of law to assume that he took her away from her husband within the meaning of Ss. 361 and 363, Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the North Arcot Division at Vellore in Criminal Appeal No. 47 of 1926, preferred against the judgment of the Court of the Sub-divisional First Class Magistrate of Vellore in C. C. No. 38 of 1926.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—The petitioner in this Criminal Revision Case was convicted by the First Class Sub-divisional Magistrate of Vellore for the offence of kidnapping a girl from lawful guardianship under S. 363, Indian Penal Code. In this petition I am not concerned with the 2nd accused who has been acquitted, on appeal, by the Sessions Judge. In the appeal which was preferred by both the accused the learned Sessions Judge while confirming the conviction of the petitioner reduced the sentence with regard to him to rigorous imprisonment for one year instead of two years. Mr. V. L. Ethiraj, the learned Counsel for the petitioner, took only two points before me. His first contention was that the facts of the case indicated an offence under S. 366, Indian Penal Code, an offence exclusively triable by the Court of Session. He therefore contended that the conviction of the accused by the First Class Magistrate for the smaller offence under S. 363 was illegal and should be set aside. The argument was that, if the facts charged showed the commission of a more serious offence which was triable only by higher tribunal, the accused was entitled to be tried on the charge by that higher tribunal and that the Magistrate had no right in spite of objection raised to grasp jurisdiction by seeking to try him for the smaller offence. It is possible to agree with such a contention under special circumstances but in the present case I am not satisfied that the facts disclosed the commission of any offence under S. 366. To constitute an offence under that section it is necessary that the kidnapping should have been with intent that the girl kidnapped may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. There is no question at all in this case of any marriage. Though

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there is no doubt whatever that the kidnapping was or must have been with intent to have illicit intercourse, still there is nothing whatever to indicate that there was likely to be any forcing or seducing for the purpose of such illicit intercourse. In the absence of any element of forcing or seducing for the purpose of illicit intercourse, no offence under S. 366, Indian Penal Code, could be regarded as possible. I therefore reject the contention that there was in this case any reasonable ground for the First Class Magistrate who tried the case supposing that the offence, if any, committed was an offence under S. 366, Indian Penal Code.

Even if it should be found that the Magistrate in this case tried the accused for an offence under a less serious section when really the offence fell under a more serious section which was beyond his competence, it has been held in *Venkatrayar* v. *Kodi Venkatarayar* (1) that his proceedings are not illegal, and therefore this court is not bound to interfere in such cases.

In any case there are not materials on which I can reasonably come to the conclusion that the Magistrate clutched the jurisdiction by intentionally ignoring the facts of aggravation as was held by Venkatasubba Rao, J., in *Setti Rangayya* v. *Somappa* (2).

The next point taken by the learned Counsel for the petitioner was that taking all the facts actually proved, there was no legal evidence whatever of any taking or enticing by the 1st accused of the girl so as to constitute an offence under S. 361, Indian Penal Code. There is no question in this case of any enticing, because on the facts, whatever might be held with regard to the taking, I am satisfied there has been no enticing by the 1st accused. The expression " enticing " involves that, while the person kidnapped might have left the keeping of the lawful guardian willingly, still the state of mind that brought about that willingness must have been induced or brought about in some way by the accused. There is no such question in this case. Then, as regards taking, it has been conceded by the learned counsel for the petitioner that that expression in the section is not confined to mere physical taking. There is such a taking as is indicated in the common expression " If you will come along, I shall take you". The expression " taking out of the keeping of the lawful guardian" must therefore signify some

1. (1921) I L R 45 M 29 : 41 M L J 398. 2. (1924) 20 L W 919.

act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian, or, in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did. The question thus resolves itself into whether in this case there was sufficient legal evidence before the lower courts on which they were entitled to come to the conclusion on the facts which they did that the accused was really responsible for the girl, P. W. 4, going out of the keeping of her lawful guardian, her husband. It is found by the learned Judge in the Court of Appeal that it was the girl that was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there. In fact, I find in one of the letters she is found to have written to the accused petitioner, she threatens that, if she was not taken away on that day, she would be a corpse on the following day. If a girl should have been wound up to such a pitch of hatred of her husband and of his house or house-hold and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something taht the accused did. After giving the matter my every careful and anxious consideration, I have come to the conclusion in this case that there is such evidence and that it is not a case in which in any view I can say that there is no legal evidence whatever on which the lower courts were not entitled to base their finding of fact. The chief point to be noted is, if the girl was in a position to escape from the keeping of the guardian by herself without any aid or assistance on the part of the accused, there was no necessity for her making such desperate appeals as she appears to have done in such exhibits as Ex. G and Ex. 2. These two letters on which an argument seems to have been attempted to be founded on behalf of the petitioner-accused himself clearly show that at any rate according to her view she was absolutely helpless and unable to leave her husband's custody unless something was done by the accused. To me it does not matter what it was that he was required to do. Undoubtedly what she wanted was that he should come and take her away or that he should in some other way afford to her that protection or assistance or promise of either which would enable her to leave her husband's guardianship. If, but for it, she should not have gone out and that was afforded finally by the

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accused, it cannot, it seems to me, be said that he was not the person that took her. In this case there were the letters in which she was desperately calling for him to come and take her away. There is the fact found that she was soon after discovered to be with the accused or under his control. From these two facts it is legitimately open to a Court of Law to assume that he finally yielded to the solicitations and made it possible for her to get away. I fail to see any difference between such an inference of fact and an inference of theft or of receiving stolen property in the case of a person discovered to be in possession of an article soon after it is stolen. I am therefore unable to say that this is a case in which there is no legal evidence whatever for the finding arrived at by the lower courts. Apart from that, however, I have no doubt whatever in my mind, having considered the whole of the evidence in the case, that the accused, though unwilling at first, finally yielded and provided the means of escape from the custody and guardianship of the husband. What those means were it is impossible to say and in most cases it must be impossible to find exactly; but it seems to me that that is unnecessary. I am satisfied that but for something which he consented to do and did ultimately, she would not have left the husband's house or would not have been able to leave her husband's house. That is sufficient taking in law for the purposes of S. 363, Indian Penal Code. It now remains for me only to refer to some of the cases cited by both sides in the course of the argument in this case and I shall do so briefly.

In the case of *Regina* v. *Fraser and Norman* (3), Lord Chief Baron Pollock held, with reference to the contention before him, that for the purpose of unlawfully taking within the meaning of the English Statute it was necessary that taking must be by some active means such as assisting in the escape from the premises, that a mere persuading to meet at some place outside the father's house would be sufficient taking within the intention of the Statute.

In *Reg* v. *Kipps* (4), it was held that it was no answer to an indictment for taking away a girl under the age of 16 years to show that the girl alleged to be abducted went away voluntarily from her home in consequence of the persuasions of the prisoner to a place at some distance where she met the prisoner and whence she went away with him without any reluctance.

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3. (1861) 8 Cox Crl. Cases 446. 4. (1850) 4 Cox. Crl. cases 167.

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In *Reg.* v. *Medows* (5), Parke, B., and Coleridge, J., appear to have held that where the girl went away voluntarily with the prisoner having been met in the road and not going immediately from her home, the case was not within the Statute.

Justice Maule referring to *Reg.* v. *Medows* (5) in *Reg.* v. *Kipps* (4) observed that if the construction apparently put upon the Statute in *Reg.* v. *Medows* (5) be the right construction the Act can hardly ever be violated except in the case of children in arms.

In the case of *The Queen* v. *Kumaraswami* (6) Bittleston, J., apparently following the English precedents held that even the fact of the woman having been the tempter and the prisoner being in the first instance reluctant to yield to her solicitations cannot render the case different from one in which the advances and solicitations are on the part of the man and the woman complies and willingly leaves her husband.

On the whole as I have already observed, the real question for determination is merely whether the cause, whether we call it ultimate or proximate, of the woman leaving the husband was something done by the person who is accused of taking her away.

I am therefore satisfied that the judgment of the learned Sessions Judge in the court below was correct. I may also add that I am not sorry in the present case to have come to the conclusion that I have, in spite of the very subtle and persuasive arguments of the learned counsel for the petitioner.

The Criminal Revision Petition is therefore unsustainable and is dismissed.

A. S. V. *Petition dismissed*

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4. (1850) 4 Cox. Crl. Cases 167. 5. (1844) 1 Car. & Kir. 399.
6. (1865) 2 M H C R 331.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces].

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, AND SIR JOHN WALLIS.

Balaram and others ... *Appellants** (*Pltfs.*)

v.

Naktu and others ... *Respondents* (*Defts.*).

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Civil Procedure Code, 1908, *S.* 66—Benami *purchase—Claim for specific performance—Promise to convey property, not supported by any consideration.*

Certain property (a village situate in District Bhandara, Central Provinces) was put up for auction sale by the Collector in execution of a decree obtained by the Zamindar against the sub-proprietors thereof for arrears of revenue, and on the 28th Oct., 1907, it was knocked down to the defendant for Rs. 3,810, of which Rs. 1,000 was paid at once and Rs. 2,810 on the 12th November, 1907. The sale was confirmed in due course on the 5th December, 1907, and sale certificate issued to the defendant, who was put in possession by the Officer of the Court on the 5th June, 1908.

The present suit was instituted by the plaintiff on the 27th October, 1919, on the allegation that he was the real purchaser, that both the sums which made up the purchase money were found by him and that the defendant was his agent in the matter of the purchase, and though instructed to purchase the property in his, *i.e.*, the plaintiff's name, had purchased it in his own. The plaintiff also alleged that before the balance of the purchase money, *viz.*, Rs. 2,810, was paid by the defendant into Court, the defendant wrote him a letter, dated the 4th November, 1907, promising to convey the property to him whenever asked to do so.

The defendant denied plaintiff's allegations in *toto,* and the plaintiff failed to establish the case set up in the plaint, namely, that the defendant had purchased the property in his own name and contrary to the directions given to him by the plaintiff.

The basis of the plaintiff's case now being that the defendant's name was entered in the sale certificate with his (*i.e*, the plaintiff's) consent, *held,* by the Privy Council (concurring with the Courts below) that this was tantamount to the purchase being *benami,* and the plaintiff was precluded by S. 66 of the Civil Procedure Code, 1908, from claiming the property on the ground that the defendant was not the real purchaser.

With regard to the plaintiff's claim for specific performance of the agreement evidenced by the defendant's alleged letter of 4th November, 1907, their Lordships of the Judicial Committee were inclined to agree with the Court of Appeal in India that the aforesaid letter was not a genuine document, and, *in any event,* they held that the plaintiff's claim for specific performance failed, inasmuch as such promise as there was in the letter was not supported by any consideration.

*P. C. Appeal No. 1 of 1927. 19th January, 1928.

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Appeal (No. 1 of 1927) from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces (Baker, J. C., and Hallifax, A. J. C.), dated the 14th November, 1923, reversing a judgment and decree of the Additional District Judge, Bhandara, dated the 29th April, 1922.

The material facts of the case are given in their Lordships' judgment, and are also briefly summarized below. The main questions for determination in this appeal were: (1) Whether the suit was barred under S. 66 of the Code of Civil Procedure, 1908; (2) whether a letter dated the 4th November, 1907, was a forged document; and (3) whether the claim for specific performance based on the said letter was barred by limitation.

On the 27th October, 1919, one Bhikha instituted the suit giving rise to this appeal in the District Court of Bhandara against Naktu and his sons, the respondents herein. Bhikha died pending the suit, and was now represented by the appellants. In his plaint Bhikha alleged that he was the real purchaser of the village in suit and the first respondent was his *benamidar;* that he alone paid the whole of the purchase money; that by a letter dated the 4th November, 1907, and written by the first respondent to him the former had agreed to convey the village to him whenever he should ask for a conveyance, and the respondents were therefore bound to convey it to him. He therefore prayed for a declaration of his title to the village and a decree for possession of it ; and, in the alternative, he prayed for a decree for the specific performance of the contract to convey contained in the letter of the 4th November, 1907.

The first respondent and his sons filed separate written statements. They denied that the first respondent was the *benamidar* of Bhikha or that the latter paid the purchase money. Their case was that the first respondent bought the village for himself and with his own money. They pleaded that, having regard to section 66 of the Code of Civil Procedure, 1908, the plaintiff could not maintain this suit ; and contended that the alleged letter of 4th November was a forgery, and that, in any case, the claim for specific performance based thereon could not be sustained under the said S. 66, and that such a claim was also barred by limitation.

The following preliminary issue was raised :—

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(1) In view of the provisions of S. 66 of the Code of Civil Procedure, is this suit not maintainable ?

On the 9th August, 1920, the Additional District Judge gave his decision. He held that it was useless to frame an issue as to whether Bhikha was the real purchaser at the sale, as he (Bhikha) was precluded by the said S. 66 from disputing that the first respondent was not the real purchaser. He, however, held on the authority of the Privy Council decision in *Vadivelu Mudaliar* v. *Peria Manicka Mudaliar* (1) that the section did not bar Bhikha from basing his title on the alleged letter of 4th November, 1907, containing an agreement to convey. The learned Additional District Judge therefore framed further issues of which only the following are now material :—

(1) Did plaintiff pay to defendant sums of Rs. 1,000 and Rs. 2,810 purchase money in connection with the Court sale of Mauza Chulod which took place on the 28th October, 1907 ?

(2) Did defendant agree by letter, dated the 4th November, 1907, to convey the property in suit to the plaintiff whenever plaintiff should ask for it?

(3) Is this letter a forgery ?

(4) Is plaintiff entitled to a decree for specific performance on the basis of it?

(5) Are any of the reliefs claimed time-barred ?

On the 29th April, 1922, the Additional District Judge delivered judgment in favour of the appellants and decreed the suit. He found the above-mentioned issues in favour of the appellants.

The respondents thereupon appealed to the Court of the Judicial Commissioner, which Court delivered judgment on 14th November, 1923. The learned Judicial Commissioners held that the fact that Bhikha borrowed the money that was paid for the village and handed it over to the first respondent for payment might be taken as proved, though possibly a careful examination of the evidence might disclose flaws in it. They, however, held that the letter of 4th November, 1907, was not genuine and that Bhikha was precluded by the said S. 66 from basing any suit on the ground that Naktu was not the real purchaser. The learned Judicial Commissioners therefore allowed the appeal and passed a decree dismissing the appellants' suit, with costs in both Courts.

1. (1920) L R 47 I A 108 : I L R 43 M 643 : 39 M L J 11 (P C).

Against the said decree of the Court of the Judicial Commissioner the Appellants appealed to His Majesty in Council.

H. R. Abdul Majid for appellants.

J. M. Parikh for respondents.

Their Lordships' judgment was delivered by

Lord Sinha.

Lord Sinha :—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces reversing a judgment and decree of the Court of the Additional District Judge of Bhandara in Suit No. 63 of 1921.

The facts out of which the suit arose are as follows :

Mauza Chulod in Perganna Kampta, District Bhandara, Central Provinces, was put up for auction sale by the Collector under a decree obtained by R. B. Indraraj Bhao, Zemindar of Kampta, against the sub-proprietors of Chulod who had failed to pay him the revenue, cesses and malikana payable by them under the C. P. Land Revenue Act. On the 28th October, 1907, it was knocked down to Naktu for Rs. 3,810, of which Rs. 1,000 was paid at once and Rs. 2,810 on the 12th November, 1907. The sale was confirmed in due course on the 5th December, 1907, and sale certificate issued to Naktu, who was put in possession by the Court Officer, on the 5th June, 1908.

On the 27th October, 1919, *i.e.*, just one day short of 12 years after the auction sale, one Bhikha filed this suit, being suit No. 63 of 1921, in the District Court of Bhandara against Naktu and his sons, alleging that he was the real purchaser, that both the sums which made up the purchase money were found by him and that Naktu, his brother-in-law (sister's husband), was his agent in the matter of the purchase, and though instructed to purchase the property in his, *i.e.*, Bhikha's name, had purchased it in his own; also that before the balance of the purchase money, viz., Rs. 2,810, was paid by him, Naktu wrote him a letter, dated the 4th November, 1907, promising to convey the property to him whenever asked to do so.

Certain other events happened between the auction sale of Chulod and the institution of this suit, which it is necessary to state as they were relied upon by Bhikha as giving him a separate and independent cause of action. Some of the sub-proprietors of Chulod had mortgaged in 1902 their share of 9 annas 6 pies in the village Chulod, together with their right to cultivate Sir land comprising 87.94 acres and Khudkast 13.28 acres to one Jagannath Marwari. The latter obtained a conditional decree for foreclosure on that mortgage on the 13th December, 1906, for Rs. 4,319, 5 annas, 2 pies. This decree was purchased by

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Bhikha on 22nd October, 1907, and the decree was made absolute on the 30th March, 1909. There were further proceedings in connection with the foreclosure between Bhikha and the mortgagors. In the end it was held that Bhikha having himself become *benami* purchaser of 9½ annas share in the village under Indraraj Bhao's decree, the mortgage debt should be apportioned and the mortgagors held liable only for Rs. 1,787-2-2 payable in respect of the Sir lands of 87.94 acres which did not pass under the *benami* purchase. As the mortgagors defaulted in paying this latter sum, the foreclosure decree was made absolute.

By his written statement in the present suit, Naktu denied that he purchased the village on behalf of or with the moneys advanced by Bhikha. He asserted that after obtaining possession by virtue of his sale certificate he remained in possession of the village collecting the rents and paying all the outgoings in respect thereof. He denied the genuineness of the letter, dated the 4th November, 1907, and he further denied that Bhikha obtained any such title to a 9½ annas share of the village by the foreclosure decree above mentioned as would entitle him to redeem. As regards the Sir lands of 87.94 acres, he disclaimed any interest therein, and asserted that he was in no way responsible for the entry in the Settlement Records with regard thereto.

In spite of the allegation in the plaint that Naktu had purchased the village in his own name and contrary to the directions given to him by Bhikha, no evidence was adduced with regard thereto, and in the Trial Court (as well as in the Appellate Court) the basis of Bhikha's case was that Naktu's name was entered in the sale certificate with his consent. This is tantamount to the purchase being *benami*, and both Courts held that Bhikha was precluded by S. 66 of the Code of Civil Procedure from claiming the property on the ground that Naktu was not the real purchaser.

But he claimed specific performance of the agreement which he alleged was evidenced by the letter, dated the 4th November, 1907. The Trial Court held that the letter was genuine and decreed specific performance on the basis thereof. The Appellate Court came to the conclusion that even if it was taken as proved that Bhikha borrowed the money that was paid for the village and handed it over to Naktu for payment, the letter, dated the 4th November, 1907, was not a genuine document even though Naktu had not gone into the witness box to deny his signature to that letter.

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On a consideration of the whole evidence, their Lordships are unable to differ from the conclusion arrived at by the learned Judicial Commissioners. The only evidence in support of the authenticity of the letter is that of the two sons of Bhikha, who were extremely young at the time when the letter is said to have been received, and is altogether unconvincing. The Judicial Commissioners considered that the letter produced did not have the appearance of one that has been lying in a Pawar Patel's house for 12 years, and the English date appearing on it is itself a ground for great suspicion. Nor is there any explanation suggested why, if such a letter had been in existence, Naktu was never called upon to execute a conveyance or deed of release in respect of the village. But the most unsatisfactory part of the case of the purchase having been made originally on behalf of Bhikha lies in the uncontradicted evidence on behalf of the defendant that ever since the date of the purchase he, Naktu, collected the rents and paid the outgoings in respect of the village and appropriated the balance as his own profit. The Trial Court, while accepting this latter evidence, considered that Naktu had been allowed to enjoy for his own benefit the difference between the rental collections and the Land Revenue as a fair remuneration for his services. This was not the plaintiffs' case and the Appellate Court rightly rejected this inference and held that it was impossible to believe that if Bhikha was the real purchaser he would have been willing to forgo the income of the whole village for an indefinite period, which extended in fact to 12 years short by one day.

Their Lordships have come to the conclusion that there is grave reason for doubting the genuineness of this letter and that in any event such promise as there is in it is not supported by any consideration, and that the claim for specific performance, which was the only claim allowed by the Trial Court, was rightly held to fail by the Appellate Court.

There remains only the last ground urged before this Board on the basis of such title as Bhikha obtained under the foreclosure decree against some of the shareholders in the village. This claim was not apparently pressed either before the Trial Court or the Appellate Court. Their Lordships have however considered it on such materials as there are on the record and have come to the conclusion that under that foreclosure decree all that Bhikha obtained was what is called the ex-proprietary title of the 9½ annas shareholder to 87.94 acres of Sir land. The fact that his title to the whole village as *benami* purchaser

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was asserted by the defendants and acquiesced in by them does not avail him to establish that title in this suit even with regard to the 9½ annas share or to base any claim for redemption on such title.

In the result this appeal fails and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants : *Francis* and *Harker*.

Solicitors for respondents : *T. L. Wilson and Co*.

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Ma Saw Kin and others ... *Appellants** (*Defts.*)

v.

Maung Tun Aung Gyaw ... *Respondent* (*Pltff.*).

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Burmese Buddhist Law—Divorce—Desertion by husband for the requisite period—Ipso facto *dissolution of the marriage tie.*

Provisions of the Burmese Law dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with.

Quaere, whether on the correct interpretation of S. 17 of the Book of Manugye, when the husband or wife has left the home, the marriage is automatically put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce. The Judicial Committee left the question open, observing, at the same time, that it only arose under the express terms of the section where there had been desertion on the one side or the other *and* failure on the part of the husband to provide the wife with any maintenance for the specified period. "Unless both conditions are satisfied, the text gives the wife no right to remarry, and the marriage tie must be considered as subsisting".

Appeal (No. 25 of 1926) from a judgment and decree of the High Court, Rangoon (Young and Brown, JJ.), dated the 23rd January, 1925, reversing a decree of the District Court of Thayetmyo, dated the 20th August, 1923.

The material facts of the case are given in the judgment of the Judicial Committee.

De Gruyther, K. C., and *Raikes* for appellants.

Pritt, K. C., and *Roskell* for respondent.

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* P. C. Appeal No. 25 of 1926. 21st November, 1927.

The judgment of their Lordships was delivered by

Sir John Wallis :—This is an appeal from a decree of the High Court at Rangoon reversing a decree of the District Court of Thayetmyo. The suit was brought by the plaintiff, Maung Tun Aung, claiming as heir of his deceased wife, Ma Thet Shay, against the three defendants, her sister and her sister's husband, Ma Saw Kin and Maung Shein, and Maung Aung Pe, his son by his deceased wife, for a partition of the properties inherited by the sisters Ma Thet Shay and Ma Saw Kin from their father U Hle, and also of properties acquired by the joint exertions of the plaintiff, his deceased wife and her sister Ma Saw Kin, the first defendant.

The defendants pleaded that the plaintiff and his wife were divorced in or about Tabaung, 1277 (March, 1916), and that the plaintiff was not entitled to any share in the property of U Hle, his deceased wife's father. They also denied that any property had been acquired by the joint exertions of the plaintiff, his wife and the first defendant, or that they were in possession of any properties to which he was entitled. Issues were then settled, the first issue being: "Was the plaintiff divorced from Ma Thet Shay, as alleged by the defendants?" Subsequently the defendants were allowed to amend their pleadings by inserting the following plea: "In the alternative, these defendants plead that the plaintiff having deserted Ma Thet Shay for over three years and contracted a second marriage, the parties had thereby become divorced."

An additional issue was framed on this amendment: "Was there a desertion as alleged in the written statements on or about Tabaung, 1277, and does such desertion operate as a divorce?"

On the first issue the defendants gave evidence of a divorce by mutual consent, but this evidence was disbelieved both by the District Judge and the High Court, so that there are concurrent findings that there was no divorce by mutual consent. On the additional issue as to the alleged desertion by the husband in March, 1916, and its operating as a divorce, the District Judge did not find that there had been any actual desertion by the husband, as it was clearly proved that the separate living was against his will, but he held with reference to certain decisions of the Burmese Courts that the plaintiff's conduct having, as he found, justified his wife in living apart from him, their separation for three years might be treated as desertion for that period by the husband, and accompanied as it was by his openly living

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with his junior wife, Ma Ngwe Yon might be treated as having dissolved the marriage.

On appeal the learned Judges of the High Court, whilst agreeing with the Trial Judge that there had been no divorce by mutual consent, held that the desertion, if any, was by the wife and not by the husband, and that on the facts proved there had been no divorce.

As to the plea that the parties had become divorced by reason of the plaintiff's having deserted his wife for over three years and taken another wife, their Lordships have come to the conclusion that the finding of the High Court, in which they concur, that there was no desertion by the husband, amounts to a finding for the plaintiff on the additional issue, and is sufficient to dispose of the appeal, as the appellants have failed to prove the grounds of divorce on which they went to trial, and cannot now be allowed to set up a fresh case.

According to the ruling of their Lordships in *Mah Nhin Bwin* v. *U Schwe Gone* (1), the Burmese law in this and similar questions is to be determined by the Manugye or Damathat of the Laws of Menoo, with such assistance as may be derived where necessary from the other Damathats. As regards the question of divorce, there have been considerable differences of judicial opinion in Burma both as to the proper interpretation of the texts themselves and as to whether some of them should not be considered obsolete. Thus the question whether either party has a right to divorce without fault of the other on giving up all share in the joint property in accordance with Manugye XII, s. 3, has given rise to conflicting decisions, which are cited in the case of *Ma Hmon* v. *Maung Tin Kauk* (2).

In the present case their Lorships are only concerned with the question of divorce as grounded on desertion, which is dealt with in Manugye V, ss. 14—17. Ss. 14—16, which may or may not be obsolete, deal with the right of the wife to remarry in case of the husband's absenting himself for purposes of trade or in search of knowledge, or on military service. In the first two cases the wife's right to remarry only arises where the husband, in addition to being absent for the period mentioned, has failed during that time to send her letters and presents. If he has, the texts give her no right to remarry. The present case is governed by the next s. 17, which has the following caption:

"The law when a husband and wife having no affection for each other separate."

1. (1914) L R 41 I A 121 : I L R 41 C 887 : 27 M L J 41 (P C).
2. (1914) I L R 1 R. 722.

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The material part of the section is as follows:—

"Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years, let each have the right to take another wife and husband. If the wife not having affection for the husband, shall leave the house and where they were living together, and, if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband or wife ; they shall not claim each other as husband and wife; let them have the right to separate and marry again".*

The section goes on to provide that if the wife remarries without waiting for the three years, or if the husband remarries without waiting for the one year, the party so wrongfully remarrying is to forfeit all the joint property of the first marriage,

"and if (the person in fault) comes to the house of the other, the person not in fault may turn (the other) out, but not accuse each other of taking a paramour or seducing husband or wife".

In their Lordships' opinion, provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with. There has been much difference of opinion in Burma, and two Full Benches of the High Court have arrived at opposite conclusions, on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce.

Their Lordships express no opinion on that question, because it only arises under the terms of the section where there has been desertion on the one side or the other and failure on the part of the husband to provide the wife with any mainten-

* There are apparently two clerical errors in this passage. S. 17 of the Book of Manugye is as follows :—

"Any husband and wife living together, if the husband saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years let each have the right to take another wife or husband. If the wife not having affection for the husband, shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of firewood, let each have the right of taking another husband and wife. They shall not claim each other as husband and wife. Let them have the right to separate and marry again".—*K. J. R.*

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ance for the specified period. Unless both conditions are satisfied, the text gives the wife no right to remarry, and the marriage tie must be considered as subsisting.

In the present case the plaintiff was married to Ma Thet Shay in 1887, and, as observed by one of the learned Judges, lived with her more or less amicably until the year 1916, a period of nearly thirty years. By that time marital relations between the parties had ceased for some years, and the plaintiff had taken a junior wife, for whom he provided a separate residence, whilst continuing to reside with the senior wife. Prior to 1916, when the divorce by mutual consent was said to have taken place, there were quarrels between the husband and wife. Ma Thet Shay and her sister Ma Saw Kin, the first defendant, who had inherited considerable property from their father, in which their husbands were entitled to share, lived with their husbands at 171, Main Road until, in consequence of an evil omen, they all moved to No. 17. Not long afterwards Ma Thet Shay and her sister went to live in another house, leaving the plaintiff in No. 17, but they continued to send him his food until 1918, when it was stopped. He then began to live openly with the junior wife, to whom he had long been married.

As Ma Thet Shay had inherited considerable property from her father, and was then in an advanced stage of tuberculosis, of which disease she died in 1922, it was obviously the plaintiff's interest to resist a divorce which might affect his rights of inheritance in his wife's estate. In these circumstances he appears to have acquiesced in his exclusion from his wife's house, to the extent of not suing for restitution of conjugal rights, or himself suing for divorce, but the evidence shows that he always repudiated the notion that there had been any divorce, and that he continued to make unsuccessful efforts to communicate with his wife until she died.

In these circumstances their Lordships agree with the learned Judges of the High Court that the effect of the evidence is that there was only a living apart by mutual consent, or, if there was desertion at all, it was desertion by Ma Thet Shay. That is not the case set up here.

For these reasons their Lordships agree with the learned Judges of the High Court that the defendants have failed to prove that the plaintiff was divorced from Ma Thet Shay, and

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are of opinion that the appeal should be dismissed with costs. and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Sanderson, Lee & Co.*

Solicitors for respondent : *Holmes, Son & Pott.*

K. J. R. *Appeal dismissed.*

Reporter's Note :—As regards the divergence of judicial opinion on this subject, see *Ma Nyun Ma Saw Aye* v. *Maung San Thein*, I L R 5 Ran. 537 (F B), where the case-law is collected. The decision of Robinson, C. J., and Maung Kin, J., in Civil Miscellaneous Appeal No. 8 of 1921, *Maung Shwe Sa* v. *Ma Mo*, cited at pp. 540, 551 of *Ma Nyun Ma saw Aye* v. *Maung San Thein*, I L R 5 Ran., 537 (F B), has recently been reported; see 105 Indian Cases 269.

It may be remarked that the case of *U Tun Aung Gyaw* v. *Ma Saw Kin* (Civil First Appeal No. 192 of 1923), to which reference was made by Brown, J., in *Ma Nyun Ma Saw Aye* v. *Maung San Thein*, I L R 5 Ran., 537 (F B), was taken on appeal to the Privy Council and the judgment of the High Court upheld, (*vide* the above report).—K. J. R.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Calcutta.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, AND SIR JOHN WALLIS.

Puran Chand Nahatta ... *Appellant** (*Deft.*)

v.

Monmotho Nath Mukerjee, since deceased, and others *Respondents* (*Pltfs.*)

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Indian Registration Act, 1908, *S.* 35—*"Persons executing the document"—Meaning of—Conveyance executed by one attorney and admission of execution before Registrar by another attorney—Validity of registration.*

The word *'executing'* in the expression "persons executing the document" (in S. 35 of the Indian Registration Act) does not mean and mean only "actually signing". A document is executed, when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required, and another person, duly authorized, may, by writing the name of the party executing, bring about his valid execution, and put him under the obligations involved. Hence the words "person executing" in the Registration Act cannot be read merely as "person signing". They mean something more, namely the person, who by a valid execution enters into obligation under the instrument. When the appearance referred to (in S. 35 of the Registration Act) is for the purpose of admitting the execution already accomplished, there is nothing to prevent the executing person appearing either in person or by any authorized and competent attorney in order to make a valid admission.

One Brojo Nath Sircar, executed a conveyance on 2nd September, 1890, which was registered on 9th May, 1891. For some reason the con-

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*P. C. Appeal No. 104 of 1925. 5th December, 1927.

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veyance was signed on behalf of Brojo Nath Sircar by Joy Krishna Bose, purporting to act under a power of attorney, dated the 20th June, 1889. This power of attorney was not now forthcoming. When the conveyance came to be registered, Brojo Nath Sircar again acted by an attorney, not Joy Krishna Bose, but another person (namely, one Bepinbihari Banerji). It was now objected that under Ss. 34 and 35 and other sections of the Registration Act, the conveyance was not validly registered, inasmuch as only Joy Krishna Bose, the person whose hand signed the conveyance, could appear as one of the persons executing it and that the appearance and admission by the second attorney (Bepinbihari Banerji), or, indeed, of Brojo Nath Sircar himself, would not suffice for a valid admission of execution of the conveyance before the Registrar. *Held,* overruling these contentions, that the registration of the conveyance was valid. The execution of the conveyance on the part of Brojo Nath Sircar was validly acknowledged before the Registrar by Bepinbihari Banerji, and therefore the non-production of the power of attorney held by the first attorney (Joy Krishna Bose) was immaterial, since the admission of Brojo Nath Sircar (acting through Bepinbihari Banerji) that he was bound by the deed, as executed, covered both the signature and the power of attorney to sign.

Appeal (No. 104 of 1925) from a judgment and order of the High Court, Calcutta (Sir Lancelot Sanderson, C. J., and Rankin, J.), in its Appellate Jurisdiction, dated the 13th February, 1925, reversing an order of the same High Court (Ghose, J.), dated the 17th March, 1924, in its Ordinary Original Civil Jurisdiction.

The material facts of the case appear from their Lordships' judgment. The case in the Court below is reported in *Monmotho Nath Mukerjee* v. *Puran Chand Nahatta* (1).

The main objection raised by the defendant-appellant to the plaintiffs' title was that the conveyance, dated the 2nd Sept., 1890, under which the plaintiffs-respondents derived their title to the premises, was inoperative to pass title for want of due registration in accordance with the Indian Registration Act, III of 1877.

Mr. Justice Ghose accepted this objection, agreeing with the finding of the Official Referee, but on appeal the learned Chief Justice, Sir Lancelot Sanderson, and Mr. Justice Rankin rejected the objection of the defendant-appellant, and held that the plaintiffs had made out a good title to the premises. Hence this appeal by the defendant to His Majesty in Council.

With regard to the registration of the conveyance in question, the admitted facts may be shortly stated as follows:—

On the 12th September, 1888, the Registrar of the High Court held a public sale by auction of the property in dispute,

1. (1925) 29 C W N 539 : 88 I C 33.

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and the father of the plaintiffs-respondents purchased it, and in pursuance of an order of the High Court a conveyance, dated the 2nd September, 1890, was executed.

The executants of the sale deed were Upendra Nath Bose and Brojo Nath Sircar, trustees under the settlement of Hari Mohan Sircar. On behalf of the said Brojo Nath Sircar, the deed was "signed, sealed and delivered at Calcutta this 8th day of September, 1890, by Joy Krishna Bose as the duly constituted attorney for and as the act and deed of the within-named Brojo Nath Sircar under a power, dated the 20th June, 1889, in the presence of Surendra Chandra Ghose, articled clerk to Babu Woomesh Chandra Banerji".

The deed of sale was presented for registration by Radha Nath Sircar on the 20th September, 1890, at the Calcutta Registry Office. It may be observed that no point arose in the case in connection with the validity of the *presentation* for registration, *vide* the judgment of Sanderson, C. J., in *Monmotho Nath Mukerjee* v. *Puran Chand Nahatta* (1).

The following endorsement by the Registrar shows the admission of the execution of the deed on behalf of Brojo Nath Sircar:

"Execution was also admitted this the sixth day of May, 1891, at the Calcutta Registry Office by Bepin Bihari Banerji, son of Umesh Chunder Banerji of Calcutta, solicitor, personally known to me as attorney for Brojo Nath Sircar, under power authenticated by me on the 2nd day of May, 1891, and recorded as No. 373 for 1891".

The Registrar duly registered the deed of sale and the plaintiffs-respondents obtained possession of the premises in dispute and had been in possession thereof ever since as absolute owners The defendant objected that no title passed under the conveyance, dated the 2nd September, 1890, because the deed was not registered in accordance with the provisions of the Registration Act, by or on behalf of Brojo Nath Sircar. It was contended that the deed was executed on behalf of Brojo Nath Sircar by his attorney, Joy Krishna Bose, on the 8th September, 1890, and that the execution of the deed was admitted before the Registrar on the 6th May, 1891, by another attorney of Brojo Nath Sircar, namely, Bepin Bihari Banerji, and not by the attorney, Joy Krishna Bose, and that therefore the registration of the deed was contrary to the provisions of the Registration Act.

Mr. Justice Ghose upheld the defendant's objection, concluding his judgment in the following words :—

"It is the actual executants of the document who are required to appear and the law nowhere requires for the purposes of registration the

1. (1925) 29 C W N 539, at p. 548 : 88 I C 33.

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appearance of persons on behalf of whom a document purports to have been executed. This view is supported by the cases of *Muhammad Ewaz* v. *Brij Lall* (2) and *Kesho Deo* v. *Hari Das* (3). It follows, therefore, that execution of the document in question not having been admitted by the actual executant, namely, Joy Krishna Bose, the Registrar of Assurances had no jurisdiction to register the document."

The Appellate Court (Sanderson, C. J., and Rankin, J.). took the contrary view.

The learned Chief Justice, Sir Lancelot Sanderson, summed up in the following words:—

"In the first place, I am not prepared to hold that Brojo Nath Sircar was not a person executing the document within the meaning of S. 35 of the Registration Act, as was contended by the learned counsel for the defendant.

"In the second place, I am prepared to hold and do hold that if Brojo Nath Sircar had appeared personally before the Registrar and had admitted the execution of the deed by his duly constituted attorney, Joy Krishna Bose, that would have been a sufficient compliance with the provisions of the Act.

"If that be so, and if the appearance of Brojo Nath Sircar to admit the execution would have been sufficient, it was, in my judgment, competent to Brojo Nath Sircar to authorize some person to appear on his behalf before the Registrar and to admit the execution, as he undoubtedly did".

Mr. Justice Rankin in the course of his judgment said as follows:—

"In my judgment, applying the language of the Statute to the particular type of case before us, the correct view is that the man whose name has been put to the document as evidencing his assent thereto, is the executant for the purpose of the section I have quoted from. That seems to me to follow very plainly from S. 35. ....

"In my judgment the attack upon the title which has been made in the present case, if allowed for a moment, would upset registered titles throughout the whole of India. It seems to me that the endeavour to read the dicta, which have been cited to us, into the Registration Act, for the purpose of showing that an admission or denial is a matter which has nothing to do with the party really affected, cannot be sustained".

De Gruyther, K. C., and *Kyffin* for appellant.

Lowndes, K. C., and *Dube* for respondents.

Their Lordships' judgment was delivered by

Viscount Sumner.

Viscount Sumner :—This appeal arises in a vendor's suit for specific performance of a contract, dated the 20th February, 1920, for the sale of a house, No. 13, Marsden Street, Calcutta. The appellant defended the suit on the ground that

2. (1877) L R 4 I A 166 : I L R 1 A 465 (P C).
3. (1889) I L R 21 A 281 (F B).

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he could not be required to accept the title offered to him, because (a) the house was included in an outstanding and enforceable mortgage, dated the 27th March, 1886, which constituted a blot on the title, and (b) because, partly by reason of the vendors' failure to produce a certain power of attorney, which ought to have been produced, and partly because the person, who appeared before the Registrar to acknowledge the execution of the conveyance with which the vendor's title began, did not satisfy the requirements of the Registration Act, the title offered was incomplete. Ghose, J., upheld his objection, but his judgment was reversed by the High Court of Calcutta on appeal.

The facts are these. On the 29th April, 1853, Hari Mohon Sircar executed a family deed of trust of sundry properties, which included the house in question. In 1879 his grandson, Brojo Nath Sircar, was a trustee. On the 19th May, 1879, a suit was brought against the trustees for the construction of this deed, for the ascertainment of the respective rights of the parties interested thereunder, and for directions as to the administration of the trust.

By a decree, dated the 31st August, 1885, it was declared *inter alia* that Radha Nath Sircar, another grandson and one of the beneficiaries, was entitled to a one-sixth share of the surplus income of properties which included No 13, Marsden street, and after other declarations and directions it was ordered that the trustees should retain their costs of suit out of the trust properties. Thereupon, and while further proceedings in the suit were still pending, Radha Nath Sircar mortgaged his one-sixth share on the 27th March, 1886. This is the outstanding mortgage in question. On 10th March, 1887, a further order was made in the suit for sale of No. 13, Marsden Street, and other properties, in order to raise the money for payment of the trustees' costs payable under the decree of 31st August, 1885. The sale was duly held and the house was bought by the father of the present respondents, the vendors to the appellant. Pursuant to the order of the Court the trustees, Upendra Nath Bose and Brojo Nath Sircar, executed a conveyance accordingly on the 2nd September, 1890, which was registered on the 2nd* May,

*Note** :—The statement in their Lordships' judgment that the conveyance was registered on the 2nd May, 1891, is not accurate. The 2nd May is the date on which the power-of-attorney in favour of Bepin Bihari Banerji was authenticated by the Registrar, and the conveyance in question was not registered till the 9th May, 1891, when the certificate of registration was

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1891. For some reason the conveyance was signed on behalf of Brojo Nath Sircar by Joy Krishna Bose, purporting to act under a power of attorney dated 30th* June, 1889. This is the document which is not forthcoming. When the conveyance came to be registered, Brojo Nath Sircar again acted by an attorney, not Joy Krishna Bose, but another person. The objection taken is that only Joy Krishna Bose, the person whose hand signed the conveyance, could appear as one of the persons executing it so as to make the registration valid, and that the appearance and admission by the second attorney, or, indeed, of Brojo Nath Sircar himself, would not suffice for a valid admission of execution of the conveyance before the Registrar. Accordingly, under the Indian Registration Act, 1877,† Ss. 34 and 35 and other sections, the conveyance was not validly registered. It is evident that, if the execution of the conveyance on the part of Brojo Nath Sircar was validly acknowledged before the Registrar, the non-production of the power of attorney held by Joy Krishna Bose is immaterial, since the admission of Brojo Nath Sircar that he was bound by the deed, as executed, would cover both the signature and the power of attorney to sign.

In their Lordships' opinion these objections fail. Radha Nath Sircar could only mortgage such interest as he took under the deed as declared by a competent Court and the interest declared in the interim decree of 1885 was subject to further orders and directions to be given by the Court in further proceedings in the same suit to provide for payment of the costs of the suit itself. The mortgagee therefore took subject to the sale, which was subsequently ordered, and the mortgage cannot prevail against the conveyance of 1890 or encumber the title to the house conveyed. The principle laid down in *Chatterput Singh* v. *Maharaj Bahadur* (4) applies equally to the suit now in question as to the case of a suit for administration of the estate of a deceased person, which was the matter then before their Lordships. No reasonable ground for distinguishing it has been pointed out.

By S. 35 of the Registration Act registration is directed when certain persons have appeared, have been duly identified,

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endorsed thereon, (*vide* the report of the case in *Monmotho Nath Mukerjee* v. *Puran Chand Nahatta,* (1925) 29 C W N 539, at pp. 542 & 548 and Ss. 60, 61 of the Registration Act.—K. J. R.

*The 30th June is obviously a slip for the 20th June—*K J. R*

†See now the Indian Registration Act, 1908 (Act XVI of 1908).—*K. J. R*

4. (1908) L R 32 I A 1 : I L R 32 C 198 : 18 M L J 125 (P C).

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and have admitted the execution of the document propounded, and the necessary persons are "the persons executing the document." The appellant contends that in these words "executing" means and means only "actually signing." Their Lordships cannot accept this. A document is executed, when those who take benefits and obligations under it have put or have caused to be put their names to it. Personal signature is not required, and another person, duly authorised, may, by writing the name of the party executing, bring about his valid execution, and put him under the obligations involved. Hence the words "person executing" in the Act, cannot be read merely as "person signing." They mean something more, namely the person, who by a valid execution enters into obligation under the instrument. When the appearance referred to is for the purpose of admitting the execution already accomplished, there is nothing to prevent the executing person appearing either in person or by any authorised and competent attorney in order to make a valid admission. Their Lordships have failed to find in the scheme of the Act, anything repugnant to this construction. Any other would involve risk of confusion and might even defeat the statutory procedure by multiplying the persons, who have to be traced and induced to attend, either by themselves or by some representative.

Their Lordships will accordingly humbly advise His Majesty that the decree appealed from should be affirmed and that this appeal ought to be dismissed with costs.

Solicitors for appellant : *Downing, Middleton & Lewis.*

Solicitor for respondents : *H. S. L. Polak.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE SRINIVASA AIYANGAR.

Chockalingam *alias* Appasami Mudaliar ... *Appellant** (*Pltf.*)

v.

Duraiswami *alias* Rathnasabapathi Mudaliar and others ... *Respondents* (*Defendants Nos.* 1, 2, 4 *to* 7, 9 *to* 11 *and legal representatives of the deceased* 11*th defendant*).

Chockalingam v. Duraiswami.

Civil Procedure Code, S. 13—*Trust—Trustee—Title to office of—Decision of Pondicherry Court as to—*Res judicata *in British Indian Courts—Trust properties situate exclusively in British India and trusts to be per-*

A. S. No. 115 of 1923. 4th May, 1927.

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formed wholly there—Trust properties situate mostly in French Territory and most of the trusts to be performed there—Charities to be performed there and in British India inseparable—Effect—Distinction—S 13, if extends to defendants—Court of competent jurisdiction—"Matter directly adjudicated upon" in the section—Meaning of—Issues decided by Foreign Court—If res judicata *in British India—Trustee—Power of appointment of successor—Exercise of—Validity—Conditions—Appointment of successor "at the time of his death"—Power of, given to a trustee—Meaning and effect—Transfer* inter vivos *of trusteeship—Validity—Revocation of transfer—Express power of—Absence in deed of transfer of—Effect—Power of revocation if implied even in such a case—Trustee with power of appointment—Imposition of further limitations in exercise of power by—Validity—Undue influence—Cessation of—Onus of proof—Prior deed found to have been procured by undue influence—Subsequent deed in favour of same person—Continuance of influence—Presumption of.*

Where the properties of a trust are all situate in British India and the trusts are all to be performed in British India, the decision of the Pondicherry Court that the 1st defendant was the validly appointed trustee of the trust and was as such entitled to the office as against the plaintiff, the rival claimant to the office, is not the decision of a court of competent jurisdiction within the meaning of S. 13 of Civil Procedure Code of 1908 and does not operate as *res judicata* in a subsequent suit between the parties in a British Indian Court in regard to the same question. But where all the items of trust property except a very small item are situate in French Territory, most of the charities to be performed under the trust are also in French territory, and the part of the charities to be performed within British India is not separable from the rest of the trust, the Pondicherry Court is a court of jurisdiction competent to adjudicate upon the title to the office of trustee of the trust and the right to administer the trust, and its decision will operate as *res judicata* in a subsequent suit in a British Indian Court between the parties and raising the same question.

Per Srinivasa Aiyangar, J. :—The expression "court of competent jurisdiction" in S. 13 of Civil Procedure Code should, for purposes of actions relating to the recovery of the office of trusteeship, be held to be the court of what may be called the domicile of the trust.

S. 13 of Civil Procedure Code is not confined in its application to plaintiffs suing on foreign judgments. A defendant is equally entitled under the section to nonsuit the plaintiff on the basis of a foreign judgment.

Under S. 13 of Civil Procedure Code, every issue decided by the foreign court is not binding on the British Indian court. The expression "matter directly adjudicated upon" in the section should be held to include the right set up by the plaintiff limited only to the particular relief granted or refused.

Per Kumaraswami Sastri, J. :—Powers of nomination given to trustees to appoint successors should be executed *bona fide* in the interests of the trust and not to secure a personal advantage. This rule applies *a fortiori* to cases of religious or charitable trusts.

Where the instrument of trust authorizes the trustee to appoint a successor "at the time of his death", the trustee has no power to make an absolute irrevocable transfer of the trust during his lifetime. A deed of transfer

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inter vivos will not be valid except on proof that the trustee making the transfer was under a reasonable apprehension of death. If, owing to illness, old age, absence from India or other causes, the trustee is not able to act, the obvious remedy is by application to the court to appoint a trustee. Such a power cannot be arrogated by the trustee.

A deed of transfer of the trusteeship executed by a trustee authorized to appoint a successor "at the time of his death" must, even in the absence of a clause reserving an express power of revocation, be held to be subject to such a power.

Per Srinivasa Aiyangar, J. .—*Semble*.—A trustee authorised to appoint a successor "at the time of his death" has power to appoint one even during his lifetime if the appointment is made *bona fide* in furtherance of the objects of the trust. He may do so if, from illness, age, or other infirmity, he becomes really incapable of satisfactorily carrying on the management of the trust. The expression "at the time of his death" should, in such a case, be regarded merely as indicating that the appointment should be made having regard to all the circumstances at the end of his life, or at the time when there is reasonable apprehension of early termination of life.

In the case of public trusts, a power of appointment should, unless there is something to the contrary in the instrument of trust itself, be regarded as a power to be exercised at or about the time when the appointment is to take effect having regard to the state of things then, and therefore any appointment so called previously made must be held to be in its very nature revocable.

Quaere : Whether it is open to a trustee appointing a successor under a power of appointment to lay further limitations on the exercise of the power.

Per Kumaraswami Sastri, J. :—Where a deed executed in June, 1913, by M in favour of the 1st defendant is proved to have been executed under influence, the onus would be heavy on the 1st defendant to show that another deed executed by M in his favour in March, 1914, was not executed while M was subject to the same influence; in other words, that, on the date of the subsequent deed, the influence which led to the execution of the prior deed was entirely absent.

Per Srinivasa Aiyangar, J. :—The determination of the question of burden of proof in such cases depends largely on the circumstances and the facts of each particular case, or, for instance, the occasion for the exercise of undue influence, the nature of the influence, etc.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in Original Suit No. 69 of 1920.

K. Bhashyam Aiyangar, V. K. Srinivasa Aiyangar and *A. K. Ramachandra Aiyar* for appellant.

S. Varadachariar, S. Doraiswami Aiyar and *V. Thiagarajan* for respondent.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS :—*Kumaraswami Sastri, J.* :—This appeal arises out of a suit filed by the plaintiff claiming to be the trustee of the three endowments which are referred to in the plaint as the

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Kumaraswami Sastri, J.

Chidambaram, Mailam and Alapakkam charities, for a declaration that he has been legally and validly appointed trustee by Murugayya Mudaliar, the previous trustee, for recovery of possession of the properties mentioned in the plaint and situate in British India, for costs and further relief.

The plaintiff is the son-in-law of the last trustee Murugayya Mudaliar while the 1st defendant is his brother's son. The 1st defendant claims that he is the properly constituted trustee. There is no dispute that Murugayya Mudaliar was the last trustee and that he executed Exhibits I and II appointing the 1st defendant as trustee and revoked the appointment by Exhibits H and H-1 appointing the plaintiff as trustee. The Subordinate Judge was of opinion that Exhibit I is invalid but that Exhibit II is valid and binding and that both by virtue of Exhibit II and by virtue of certain proceedings in the Pondicherry Court the appointment of the 1st defendant is valid and is not defeated by the subsequent wills, Exhibits H and H-1, in favour of the plaintiff. Hence the appeal.

There is no dispute about the relationship as set out in the geneological table annexed to the plaint from which it appears that Pichya Mudaliar the propositus had two sons, Thoppai Muthia Mudaliar and Thoppai Sabapathi Mudaliar, that Thoppai Muthia Mudaliar had three sons, Ananda Thandavaroya Mudaliar, Ayyasami Mudaliar and Periyasami Mudaliar; that Ananda Thandavaroya Mudaliar had three sons, Murugayya Mudaliar, Velayutha Mudaliar and Nataraja Mudaliar, and that Velayutha Mudaliar's son is Rathnasabapathi Mudaliar, the 1st defendant.

The three charities were founded under the three deeds, Exhibits A, B and C. The first Exhibit A is dated the 15th of January, 1862, and is executed by Thoppai Muthia Mudaliar and Thoppai Sabapathi Mudaliar and his three sons. It refers to what is known as the Chidambaram charities. The charities were all to be performed in British India and the lands endowed were all situate in British India. As regards devolution the material portion of the document runs as follows:—

"The said donors further stated that the management of the said Nanja and Punja lands and the said sum of Rs. 2,000 shall be with the said Ayyasami Mudaliar, one of them, that he shall keep the sum with him and pay interest thereon at 10 per cent., and out of the interest and out of the income of the said nanja and punja lands, after deducting the sircar kist, shall be conducting the charities of the said Thoppai Mudaliar's chatram and the charities of the said temple for ever so long as the sun and the moon last. that after his life time, the persons appointed by him

shall conduct the aforesaid charities as aforesaid and that they shall in future have no manner of right, title or interest in the said lands and Rupees two thousand".

Exhibit B which relates to what is known as the Mailam charities is dated the 19th of April, 1867, and is executed by Thoppai Muthia Mudaliar, Thoppai Sabapathi Mudaliar, and Thoppai Muthia Mudaliar's son Ananda Thandavaroya Mudaliar. This deed endowed properties both in Pondicherry and British India and relates to the performance of the charities in British India and Pondicherry. The deed constitutes Ayyasami Mudaliar as the first trustee and gives him power to appoint a person after his lifetime. The third deed Exhibit C which relates to what is known as the Alapakkam charities is dated the 24th of January, 1874, and is executed by Ananda Thandavaroya Mudaliar, and Ayyasami Mudaliar is constituted as the trustee and the devolution is on the male heirs of Ayyasami Mudaliar. There is no power of appointment given.

The correct translation as regards the power of devolution given in the first two documents is thus given by the Subordinate Judge in his judgment :

"that he himself should at the time of his death appoint a person to administer the said charities after his death"

Exhibit I is dated the 29th of June, 1913, and it purports to be an agreement regarding the administration of the dharmam. It is executed by Murugayya Mudaliar in favour of Rathnasabapathy Mudaliar, the 1st defendant. After reciting that Thoppai Muthia Mudaliar the grandfather endowed properties for dharmam and that his son Ayyasami Mudaliar conducted the dharmam and appointed the executant Murugayya Mudaliar to administer the dharmam which he has been conducting, it goes on to state :

"Since in order that the said dharmams may be conducted regularly and for ever, it is absolutely necessary that they should be conducted by the descendants of Muthia Mudaliar who instituted the dharmams originally the following agreement has been entered into by us:

For the reasons aforesaid the said Murugayya Mudaliar appoints his younger brother's son, Rathnasabapathi Mudaliar, for conducting the said dharmam after his (Murugayya Mudaliar's) lifetime.

Further he appoints the said Rathnasabapathi Mudaliar to administer the dharmam relating to the chatram also which the said Ananda Thandavaroya Mudaliar has constructed in Alapakkam in Cuddalore taluk in British territory".

Exhibit II which is dated the 6th of March, 1914 is executed by Murugayya Mudaliar in favour of Rathnasapathy Mudaliar. It begins as follows :

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"As some particulars have not been recited in detail in the agreement in the matter of the administration of charities which has already been executed on the 29th June, 1913, as between these persons, the present agreement in the matter of the administration of charities has been executed."

Then it gives the history of the three charities and the names of the successive trustees and states that the executant Murugayya Mudaliar was conducting the charities according to the trust constituted. Then it goes on as follows :

"As considering that I am now advanced in age the following agreement has been executed as between us in order to ensure the proper performance of the charities in future. For the aforesaid reasons, I, the aforesaid Murugayya Mudaliar, do hereby declare that I have appointed Rathnasabapathy Mudaliar alias Duraiswami Mudaliar, one of the sons of my junior brother Ananda Velayuda Mudaliar, in order to perform the said charities properly in future as heretofore and that I have hereby transferred to the said Rathnasabapathy Mudaliar all the privileges and powers vested in me by my junior paternal uncle, the said Ayyasami Mudaliar, so far as the aforesaid administration of the charities is concerned

The said Rathnasabapathy Mudaliar alias Duraiswami has also consented to administer the said charities.

However, I, the said Murugayya Mudaliar, reserve to myself the power to give during my lifetime, whenever necessary, my advice to the said Rathnasabapathy Mudaliar alias Duraiswami in the matter of the administration of the said charities".

I may state here that this clause about advice does not mean much as there is nothing to compel Rathnasabapathy Mudaliar *alias* Duraiswami Mudaliar to accept the advice and act up to it. Exhibit II was impugned by the plaintiff as a forgery. It appears from the proceedings in the Pondicherry Court, a copy of the judgment in which has been filed as Ex. IV, that a suit was filed in Pondicherry against Murugayya Mudaliar by Rathnasabapathy Mudaliar for possession of the deeds relating to the charity and for possession of the charity properties in Pondicherry on the ground that Rathnasabapathy Mudaliar was the only constituted trustee, and that the genuineness of Exhibit II was impeached by Murugayya Mudaliar, as also the validity of the appointment of Rathnasabapathy Mudaliar. An issue was directed by the Pondicherry Court as regards the genuineness of the document and two experts were examined. Murugayya Mudaliar did not let in any evidence and remained *ex parte* when this question was tried and the French Court found Exhibit II to be genuine. He then appeared and raised the question as to the right of the defendant to get possession of the documents relating to the trust. The first court held that Exhibit II did not empower Murug-

ayya Mudaliar to appoint the 1st defendant as trustee so as to give a present right for the recovery of deeds and property but the appellate court reversed the decision. Murugayya Mudaliar died during the pendency of the proceedings in appeal and the present plaintiff was brought on record. The Subordinate Judge finds Exhibit II to be genuine both on the evidence and because of the decision of the Pondicherry Court.

It has been argued by the appellant that it is improbable that Exhibit II would have been executed by Murugayya Mudaliar as it appears there were proceedings in the French Court for partition which resulted in seals being put on the house of Murugayya Mudaliar, that the feelings between the parties were strained, that the deed of partition executed shortly before contains no indication that Murugayya Mudaliar was going to divest himself of the management, that it is extremely unlikely that Exhibit II would have been executed shortly after the partition, that Exhibit II is not registered in any form that required Murugayya Mudaliar's presence and assent and that there is difference in signatures. I confess that there is considerable force in the argument of the appellant, but Murugayya Mudaliar did not contest the genuineness of Ex. II, which was found by a competent court in Pondicherry to be genuine. I do not think there are sufficient grounds for reversing the view of the Subordinate Judge as to Exhibit II. After Ex. II was executed, Murugayya Mudaliar cancelled the appointment under Ex. II first by the will Ex. F and then by another will Exhibit G appointing different persons as trustees and lastly by Exhibits H and H-(1) in favour of the plaintiff his son-in-law. There is no dispute as to the genuineness of Exs. H and H-1 and the question is whether Exhibits H and H-(1) give the plaintiff a right as against the first defendant who was constituted trustee under Exhibits I and II.

So far as the Alapakkam charities constituted by Exhibit C are concerned, it is clear that Ayyasami Mudaliar had no power of appointment given to him. The deed expressly states that the trusteeship after the lifetime of Ayyasami Mudaliar is to descend to his male heirs, and Murugayya Mudaliar has left two sons, Subramania Mudaliar and Kunchithapada Mudaliar. As regards this charity neither the plaintiff nor the 1st defendant has any right.

It is argued that Murugayya Mudaliar prescribed for a trustee involving powers of nomination and that although the

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original deed did not give him the power he is entitled to nominate, and reliance is placed on *Annasami Pillai* v. *Ramakrishna Mudaliar* (1). There is nothing in the evidence or in the conduct of Murugayya Mudaliar to show that he prescribed for any such power as regards the Alapakkam charities. The mere fact that he executed Exhibits I and II and H and H-(1). would not show that he prescribed for any such power.

It is argued by Mr. Bhashyam that the plaintiff is under the will of Murugayya Mudaliar entitled to get the properties from the defendants although it may be his duty to hand them over to Murugayya Mudaliar's sons. I do not think that having regard to the present suit which is one in ejectment any relief can be given to the plaintiff unless he proves his own title. The infirmity of the 1st defendant is no ground for giving any relief to the plaintiff. It will always be open to persons who are really entitled to sue the defendants and get possession if they establish their claim.

As regards the other two charities, two questions arise, the first as to the validity of Exhibits I and II and the second as to the force of the judgment of the Pondicherry Court. I have already referred to the suit filed in the Pondicherry Court by the 1st defendant against Murugayya Mudaliar. As regards Exhibit I, the Subordinate Judge finds that it is invalid as it was obtained under coercion and undue influence.

The facts which led up to Exhibit I and which are not disputed before us are shortly these. Prior to the execution of Exhibit I, Murugayya Mudaliar and the 1st defendant were members of an undivided family. Disputes arose owing to Murugayya Mudaliar wanting to marry his daughter to the plaintiff and the 1st defendant wanted to prevent the marriage and get a partition of the properties. The 1st defendant filed a suit in Pondicherry claiming a partition and during the absence of Murugayya Mudaliar in Chidambaram he got the house of Murugayya Mudaliar sealed. Then there was some mediation and Exhibit I was executed the day before the seals were removed. The Subordinate Judge believes the evidence that Murugayya Mudaliar did not freely and voluntarily execute Exhibit I, bud did so on pressure and to get the seals removed. He believes the plaintiff's 2nd and 3rd witnesses who state that the 1st defendant wanted Murugayya Mudaliar to execute

1. (1900) I L R 24 M 219 : 11 M L J 1.

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Exhibit I, before he asked the seals to be removed. I agree with the Subordinate Judge in thinking that Exhibit I is invalid.

The law is clear that in cases of powers of nomination given to trustees to appoint successors, they should be executed *bona fide* in the interests of the trust and not to secure a personal advantage. This is the law even as regards ordinary powers and I think it applies *a fortiori* to cases of religious or charitable trusts, where elements of personal gain or advantage should find no place in the appointment, the benefit to the institution being the sole consideration.

As regards Exhibit II it was executed on the 6th of March, 1914. The deed of partition Exhibit III is dated the 23rd of February, 1914. The evidence of the plaintiff's 2nd and 3rd witnesses whom the Subordinate Judge believes shows that at the time Exhibit I was executed the 1st defendant wanted an immediate transfer of the trust to himself and that Exhibits I and II and the partition deed were really parts of one transaction. In fact Exhibit II begins by stating that as some particulars have not been recited in detail in Exhibit I, the present agreement was executed to supply the details which were not mentioned in Exhibit I. If Exhibit II is treated as a ratification of Exhibit I, it is clear that, Exhibit I being absolutely void as being a fraud on power having regard to the circumstances under which it was executed, Exhibit II would be invalid as a ratification of Exhibit I. There can be no question that a void transaction cannot be ratified. Mr. Varadachari argues however that Exhibit II could be taken as a fresh appointment. Having regard to the facts of the case, I doubt whether Exhibit II can be treated as a fresh appointment where, on the face of it, it states that it was executed to supply certain omissions in Exhibit I. But even if it is taken to be a fresh appointment, the onus is heavily on the 1st defendant to show that on the date on which Exhibit II was executed, the influences which led to the creation of Exhibit I were entirely absent and that Exhibit II was uninfluenced by any considerations except the good of the trust. I need only refer to 23 Hals., S. 53, *In re Wright : Hegan* v. *Bloor* (2), *Zopharm* v. *Duke of Portland* (3) and *Humphrey* v. *Davies* (4). Exhibit II purports to be an immediate transfer of the right to the office, and, as I have pointed out, the power to advise gives no effective control to Murugayya as the power is merely advisory.

2. L R (1920) 1 Ch. 108. 3. (1870) L R 5 Ch. A 40.
4. (1859) 28 L J Ch. 406.

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It is clear from the deed constituting the Mailam and Chidambaram trusts that the devolution of trusteeship is not to be hereditary in the line of the founders but by successive appointments and so no question arises as to the transfer by one trustee to the next in the line of succession.

It has been held that a trustee is not entitled to transfer such a trust in his lifetime. In *Narayana* v. *Ranga* (5), Muthuswami Aiyar and Shephard, JJ., held that the transfer of a religious office was invalid except possibly in the case of transferees in succession. The learned Judges observe :

> "According to general principles, a religious office cannot, *prima facie*, be made the subject of alienation. The succession to such an office is governed in the first instance, by the will of the founder, and, in the absence of direct evidence on that point, by usage of the particular institution from which the founder's will may be inferred. A religious office appears to us to stand with reference to alienability on a different footing from private property".

After referring to *Kuppa* v. *Doraiswami* (6), the learned Judges observe :

> "Unless the alienee is the sole heir, the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the founder. * * * * * We are not prepared to dissent from the dictum above quoted and to hold that in the absence of special usage, an alienation would be valid if made in favour of any person other than the sole immediate heir".

I may also refer to *Sennayan* v. *Sinnappan* (7) where it was held that renunciation of a non-hereditary religious office is invalid even though it is to the next heir of the releasor and *Rajam Bhattar* v. *Singarammal* (8). I have already set out the terms of the deeds constituting the trust to show the nature of the power of appointment conferred. It seems to me to be clear from the wording that what was contemplated was that the testator should reserve to himself the power of making the appointment till the time of his death. I find it difficult to construe the words as giving him the power to make the appointment so as to divest himself during his lifetime of the power of management. It should be remembered that this is a case of charitable trust, and having regard to the interests of the institution it is difficult to strain the words in the deeds constituting the trust so as to give the trustee absolute irrevocable power to transfer the trust during his life time and to make such transfers

5. (1891) I L R 15 M 183 : 2 M L J 19. 6. (1882) I L R 6 M 76.
7. (1910) 20 M L J 654. 8. (1918) 36 M L J 355.

irrevocable unless the deed of transfer itself reserves the right of revoking it. Where power is given to appoint a trustee "at the time of his death", there should, to make any appointment valid, where it is by deed *inter vivos* to take effect at once, be proof that there were circumstances showing that the person making the appointment had a reasonable apprehension of death and it is always subject to the condition that if the trustee making the appointment recovers the transfer is not to operate. The obvious intention of the author of the trust is to authorise the appointment of a successor and not to authorise an abdication. If owing to illness, old age, absence from India or other cause the trustee is not able to act, the obvious remedy is by application to court to appoint a trustee. Such a power cannot be arrogated by the trustee. Otherwise a trustee can before his death appoint another person, under the plea that he is unable or unwilling to perform his duties. There is nothing except the recital in the deed of appointment that the trustee was in apprehension of death or was physically unable to carry out the trust. Cases have been referred to where in English Law a power of appointment if executed by a deed *inter vivos* is irrevocable unless the deed itself reserves the power of revocation. In the case of religious trusts, where the deed constituting the trust clearly expresses an intention that the appointment should be made only at the testator's decease, the trustee cannot give the go by to it by executing it without putting a revocable clause. Though the deed *inter vivos* to take effect after his death may satisfy the requirements, such a deed must always be subject to the controlling clause in the deed of trust and, even though the express power of revocation is not reserved, I would, having regard to the terms of the trust deed, hold that it is subject to revocation. It is clear that the appointment of the 1st defendant has been revoked by the will in favour of plaintiff.

The next question is as to the effect of the proceedings in the Pondicherry Court rendering any contentions in this suit *res judicata.*

As regards the Chidambaram charities I think it is clear that the Pondicherry Court had no jurisdiction in the matter, as the properties are all situate in British India and the trusts are all to be performed in British India. The action in the Pondicherry Court was merely an action in personam against the trustee to deliver up the documents of title and for purposes of that adjudication it became necessary to see whether the appointment of the plaintiff was valid. In *Companhia de Mocambique*

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v. *British South Africa Company* (9), Wright, J., after referring to the authorities observes as follows :

"The proper conclusion appears to be that, speaking generally, and subject to qualifications depending on personal obligations, it is a general principle of jurisdiction, that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the courts of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countrics (see *Story's* Conflict of Laws, Ss. 551-555). It does not in any way involve a denial of jurisdiction to give relief in personam, or against property in this country, in any case where title to the foreign land is not directly involved or can be proved as a fact by the judgment of a competent court in the foreign country."

Story in his Conflict of Laws states the law as follows in Art. 551 :

"In respect to immoveable property every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution in rem."

In Art. 591, the law is thus summarised:

"If the matter in controversy is land, or other immoveable property, the judgment pronounced in the *forum rei sitae* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other court can have a competent jurisdiction to enquire into or settle such right or title. By the general consent of nations therefore in cases of immoveables, the judgment of the *forum rei sitae* is held absolutely conclusive .... On the other hand, a judgment in any foreign country, touching such immoveables, will be held of no obligation.

In *Boyse* v. *Colclough* (10), it was held that Irish courts had no jurisdiction over immoveable properties in England and that any declaration as to the validity or invalidity of any will by Courts in Ireland cannot so far as it relates to lands in England be treated as a bar to a suit.

Dicey in his Conflict of Laws thus states the rule as regards immoveable property as follows :

"All rights over, or in relation to, an immoveable (land) are (subject to the exceptions thereinafter mentioned) governed by the law of the country where the immoveable is situate *ex situs*".

It is unnecessary to consider the exceptions as they do not touch the present case.

The question as to the jurisdiction of foreign courts to deal with the subject matter in British India before the principle of *res judicata* can be applied is also considered in *Maqbul*

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9. L R (1892) 2 Q B D 358, at p. 366.
10. (1854) 1 K and J 124 : 69 E R 396.

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Fatima v. *Amir Hasan Khan* (11), which decision was confirmed by their Lordships of the Privy Council in *Mussammat Maqbul Fatima* v. *Amir Hasan Khan* (12). I may also refer to the judgment of Abdur Rahim, O. C. J., in *Shiyali Subraya Chetty* v. *Calve Subraya Chettiar* (13), where the learned Judge has considered the question of jurisdiction of French Courts over properties situate in British India so as to constitute any adjudication in Pondicherry Court *res judicata,* and I am in entire agreement with the views of the Officiating Chief Justice. I do not think the decision of the Pondicherry Court renders the question as regards the Chidambaram trust *res judicata*.

As regards the Mailam trust the case stands on a different footing. A number of properties comprised in the trust are within the jurisdiction of the Pondicherry Court. The trusts to be performed are the annual feeding of Brahmins in Melachalam, Tindivanam taluk (British territory), Ubhayam in the Skanda Shashti festival in the temple in Pondicherry (French territory), expenses in connection with the lighting of another temple in Pondicherry (French territory) and the maintaining of a chattram in Pondicherry (French territory). It is clear that with the exception of the annual feeding of Brahmins in Melachalam, all the other trusts are to be performed in Pondicherry. The parties to the Pondicherry litigation were residents of Pondicherry and it cannot be said that the Pondicherry Court had no jurisdiction to adjudicate upon the question as regards the Mailam charities. It is impossible to separate the trust relating to the property in British India from the trust relating to property in Pondicherry or to appoint two trustees, for the courts in Pondicherry would be bound by their own decision and would not recognise another trustee appointed in British India to perform the trusts in so far as they are in Pondicherry. This is not a case where it can be said that the Pondicherry Court had no jurisdiction to decide the question in controversy in so far as it related to the performance of the major portion of the trust or the right to be in possession and management of the properties, as the trust property is situate in Pondicherry. This case is therefore clearly distinguishable from the Chidambaram charity. If it were possible to separate the charities in so far as they relate to properties in British India from the charities in Pondicherry and to give effect to the deed of trust by constituting plaintiff as trustee of the

11. (1914) I L R 37 A 1. 12. (1916) 20 C W N 1213 (P C).
13. (1916) 5 L W 740.

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portion of the property situate in British India, I would do so, but that is, having regard to the terms of the trust which make no separate appropriation of the incomes of the trust property to the particular charities named, obviously impossible. I am not prepared to hold that the decision of the Pondicherry Court is not a sufficient ground for our upholding the claim of the 1st defendant.

In the result I allow the appeal in so far as it relates to what is described in the plaint as Chidambaram charity and declare that the plaintiff is the person entitled to be the trustee and to be in possession and management of the properties appertaining to that trust, and the defendants or such of them as are in possession will deliver the property to the plaintiff.

As regards the Alapakkam and Mailam charities the plaintiff's suit will be dismissed.

As regards costs as neither party has succeeded in all his contentions, I think the proper order will be to direct each party to bear his costs throughout.

Srinivasa Aiyangar, J

Srinivasa Aiyangar, J. :—Questions of great difficulty and considerable legal interest have been raised and argued in the course of the discussion of this appeal. By the courtesy of my learned brother I have had the advantage of perusing beforehand the judgment just delivered by him and I should not have deemed it necessary to write a separate judgment were it not that I felt persuaded that it might be useful to restate some of the propositions from a slightly different standpoint.

The appeal was argued on both sides with considerable learning, by Mr. Bhashyam for the appellants strenuously and by Mr. Varadachariar for respondents with great clearness and cogency. The appellant before us was the plaintiff in the suit from which it has arisen. The suit has been dismissed in its entirety by the learned Subordinate Judge. The claim relates to the office of trusteeship in respect of three charities which have been respectively called in the course of the argument the Chidambaram, the Mailam and the Alapakkam charities. In the judgment of my Lord just delivered, the genesis and history of the charities and other particulars regarding the same have been set out and I do not think it necessary to re-capitulate the same. The plaintiff-appellant has claimed the office of trusteeship in respect of all these charities. That claim necessarily involves the denial of the claim set up by the 1st defendant to the office of trusteeship in respect of the same charities. The

plaintiff's claim to the office is based on an appointment by the late Murugiah Mudaliar. On such a claim the question with regard to the trusteeship of what are called the Alapakkam charities may easily be disposed of. As the plaintiff claims on the basis of an appointment by Murugiah Mudaliar, the question arises whether Murugiah had himself any such power of appointment. Exhibit C is the instrument of trust relating to the Alapakkam charities. The said deed is purported to be executed in favour of Ayyasami Mudaliar, the trustee appointed therein, and the provision in it for succession to the office of trusteeship is :

> "that the said dharmam shall after the lifetime of yourself be administered by your heirs."

It must be observed that the plaintiff does not claim under the original deed of trust or the scheme of succession provided thereby but under and by virtue of appointment by Murugiah. It has been argued that Murugiah had acquired by prescription a right to appoint his successor, because in and by the will of Ayyasami he gave such a power of appointment. It is difficult to see how Ayyasami was entitled, contrary to the terms of the deed of trust, to grant such power or prescribe a different line or mode of succession. There is no evidence worth the name or any materials on which such acquisition of power contrary to or different from the original deed of trust can be inferred. The bare fact is that Murugiah purported to appoint a successor and from that alone the inference of a completed acquisition of right by prescription cannot be held to be proper. It must be remembered that Murugiah was in the line of male heirs of Ayyasami and by the mere fact of his having excluded his brothers from the office of trusteeship he could be regarded only as having prescribed for sole trusteeship. If the acquisition, by prescription, of such right to appoint, should be recognised on such slender material, nothing would be easier than to frustrate the provisions in the deeds of endowments and to change the scheme for succession in the office of trusteeship. I agree therefore that Murugiah had no power to appoint his successor. The plaintiff's claim in respect of the Alapakkam charities thus fails.

As the plaintiff's title in respect of the Alapakkam charities has had thus to be negatived it is unnecessary to discuss the claim of the 1st defendant with regard to the same. The plaintiff who seeks the recovery of the properties relating to the endowment having failed to make out his title, it is unnecessary to make

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any pronouncement with regard to the 1st defendant's title in this case.

As regards what are called the Chidambaram and Mailam charities, Murugiah at first during his lifetime appointed by Exhibit I the 1st defendant to be trustee in his place after his own life-time. It has been found by the lower Court that Ex. I was brought about by undue influence and that therefore the appointment thereunder could not be regarded as valid. That finding has not been challenged before us. But the 1st defendand also claims to have been appointed under Exhibit II. That appointment was one to take effect even during the lifetime of Murugiah himself. This document Exhibit II has been impeached as a forgery. The lower court has found the document to be genuine. I am not satisfied that it is a forgery. There is no indication in the terms of the document that it is not a genuine document. It may also be observed that if the 1st defendant was fabricating a document by which he was to be appointed a trustee, it is very unlikely that he would have inserted a provision therein reserving to Murugiah the appointer powers of supervision over the management of the charities during the lifetime of Murugiah. The learned vakil for the appellant argued strenuously and at great length that, having regard to the finding that Exhibit I was brought into existence by undue influence, the burden of proving that the appointment under Exhibit II was at a time when the undue influence had ceased was heavily on the defendant. The determination of the question of burden of proof in such cases depends largely on the circumstances and the facts of each particular case. The occasion for the exercise of undue influence, the nature of the influence and several other matters would have to be taken into consideration in determining whether at a subsequent period or point of time the undue influence should be regarded as having continued or ceased. But having regard to the fact that the marriage was over and that the partition between the parties had also been completed and carried out, there is no reason whatever to suppose that the undue influence which was brought to bear when Exhibit I was executed, lasted or continued until the execution of Exhibit II. On my finding that even if the burden of proof should be held to be on the 1st defendant affirmatively to establish that the undue influence, which was operative when Exhibit I was executed, must have ceased some considerable time before the execution of Exhibit II, it seems to me unnecessary to refer to or discuss the cases cited on the question of burden of proof.

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At one stage of the case I was impressed by the argument regarding the genuineness of Exhibit II by reason of the absence of any reference to it in Exhibit K and other documents. But it has been pointed out that Exhibit K was subsequent to the 1st defendant's suit in the French Court and there can be no doubt that after the institution of that suit by the 1st defendant Murugiah must have made up his mind to impeach Exhibit II. There is therefore no force in that argument.

I am not persuaded that the finding of the lower court with regard to the genuineness of Exhibit II is incorrect. Soon after the execution of Exhibit II it was that the 1st defendant filed an action in the French Court against Murugiah for the recovery of the office of trusteeship on the ground that he has been validly appointed trustee by Murugiah and also for the recovery of the key and the documents relating to the charity properties, and it was thereupon that Murugiah purported by Exhibit K and the succeeding wills made by him, to revoke the appointment. Ultimately the French Court of Appeal held in favour of the 1st defendant that he had been properly appointed trustee by Murugiah and that he was entitled to the office of trusteeship and the management of the charities. For the defendant this adjudication is relied upon as operating by way of *res judicata*. For the plaintiff-appellant it has been contended that it could have no such effect. Mr. Bhashyam for the appellant argued that S. 13, Civil Procedure Code, refers only to suits instituted by plaintiffs on foreign judgments and cannot be held to apply to defendants. For this he has relied upon the decision of the Allahabad High Court, *Maqbul Fatima* v. *Amir Hasan Khan* (11). This case was no doubt confirmed and not reversed by the Judicial Committee of the Privy Council. See *Mussamat Maqbul Fatima* v. *Amir Hasan Khan* (12). S. 13 of the Civil Procedure Code is general and is not so termed as to be applicable only to plaintiffs suing on foreign judgments. The suit to which the decision of the Allahabad High Court referred was one for a declaration that a certain issue was *res judicata* in a foreign Court. For such a declaration no suit was obviously sustainable. I am therefore unable to regard the mere fact of the confirmation by their Lordships of the Judicial Committee of the decision in the Allahabad case as tantamount to an approval by their Lordships of every expression of opinion by the learned Judges of the Allahabad High Court.

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11. (1914) I L R 37 A 1. 12. (1916) 20 C W N 1213 (P C).

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After all the case in *Louis Castrique* v. *William Imrie* (14) was not a case by the plaintiff on a foreign judgment and the defendant was held entitled to non-suit the plaintiff on the basis of the foreign judgment. Having regard to the very clear terms of S. 13, Civil Procedure Code, it seems to me impossible to accept the contention of the learned vakil for the appellant in the matter.

Then Mr. Bhashyam argued that the rule of *res judicata* set out in S. 13 must be construed as referring only to the actual decree passed by the court and not extending to the grounds of decision or to the issues decided. His contention was that when a foreign judgment directs the payment of money by the defendant to the plaintiff it is in the nature of a debt and the judgment itself is only proof of the debt and no more. In this matter the difference may be considered between the terms of S. 11 and S. 13, Civil Procedure Code. S. 11 refers to the decision with regard to the issue also. S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Having regard to the language of S. 13, it seems to me that while Mr. Bhashyam's contention that refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. Every issue, albeit necessary for the decision of the matter in dispute cannot be regarded as a matter directly adjudicated upon. Many issues are in their nature merely ancillary. Thus it cannot be held that if a person's adoption is held valid by a foreign Court and on that ground some property is decreed to him the finding on the adoption is binding on the British Courts. If otherwise it would result in greater effect being given to the judgment of the foreign Court that even to the local tribunals. The decision of the Court should be regarded not merely as relating to the delivery of money or property, but to the recovery of a particular fund or property on the title set up. In other words, the expression "matter directly adjudicated upon" should be held as undoubtedly to include the right set up by, limited only to the particular relief granted or refused.

Accepting therefore to this extent the contention on behalf of the appellants, I have come to the conclusion that the finding of the French Court with regard to Ex. II being genuine is not binding on this Court as *res judicata* as the issue cannot be

14. (1869) L R 4 H L 414.

regarded as a matter directly adjudicated upon. But as I have already indicated I have come to the conclusion on the evidence in the case that the finding of the lower Court with regard to its genuineness is correct.

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The next question that arises for consideration is whether the decision of the French Court that the 1st defendant was the validly appointed trustee is *res judicata* with respect to Chidambaram and Mylam charities. The solution of that question depends on (1) whether it was a judgment of a court of competent jurisdiction, (2) whether it was a judgment on the merits, and (3) whether that was the matter directly adjudicated upon by the French Court. The learned vakil for the appellant argued that the French Court was not a Court of competent jurisdiction at any rate in respect of all the immoveable property relating to the trust situate in British India. There can be no doubt that the jurisdiction referred to in S. 13 is not local or municipal jurisdiction under the Civil Procedure Code but jurisdiction according to the principles of private international law. There can also be no doubt that under the rules of private international law if the action should be regarded as one relating to immoveable property the law applicable is the law of the country in which the land is situate. But I am unable to accede to the contention on behalf of the appellant that the suit in the French Court was one for the recovery of immoveable property. Taking the suit as a whole it seems to me that it cannot properly be described in legal language as a suit for property or as one for a declaration of title to property but the only description of the suit which can be regarded as satisfactory is to regard it as one for the office of trusteeship.

What then is the law applicable to the recovery of the office of trusteeship? Whatever might have been the state of things in the world in former times, there can be no question whatever, that having regard to the increasing international amity and intercourse, many trusts may come to be constituted the properties relating to which may happen to be situated in different sovereignties. It is not impossible to imagine in these days of growing internationalism a person constituting a trust to which are endowed properties situate in France, England, America and elsewhere. If the strict rule of the *lex situs* should be applied, it would follow that in regard to the trusteeship of the trust, different Courts might come to hold differently having regard to the law applicable, and whereas the French Court might hold 'A' was the proper trustee, the English Court

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might hold that 'B' was such trustee as the Courts of another country might hold that 'C' was the trustee entitled. I am therefore inclined, on a proper application and appreciation of the principles of private international law, to hold that with regard to the question relating to the office of trusteeship the Court of competent jurisdiction within the meaning of S. 13 of the Civil Procedure Code is the Court of the country which is the court of what may be regarded as the domicile of the trust. I am aware that the expression 'domicile' may be regarded as inappropriate with regard to trusts. I am not also unmindful of the difficulties that often may arise in determining any such question of domiciles. But, after all, a single trust comprehending properties situate within various sovereignties is not unlike a corporation for legal purposes and there is no reason or principle why such a trust should not for purposes of jurisdiction also be regarded as having or acquiring a domicile.

With regard to the persons the demonstration of the domicile is determined having regard to various considerations, such as original domicile, change of domicile, intention to go back to the original domicile, subjection and so forth. I do not see why similarly with regard to trusts there should not be recognised a domicile based on the place where the trust is made, the domicile of the trustees, the place where the trusts are to be performed, the place where the trust property is situate and so on.

The expression therefore in S. 13 namely "the Court of competent jurisdiction" should, for purposes of actions relating to the recovery of the office of trusteeship, be held to refer to Courts of the country which have jurisdiction in what may be called the domicile of the trust.

The suit in the French Court by the first defendant cannot properly be regarded as a real action but only as a personal action for a declaration of rights and the recovery of the office. The immoveable property such as it may be follows the office wherever situate. The plaintiff in the present action as the ultimate defendant in the French suit was a domiciled French subject and submitted himself to the jurisdiction of the French Court in that action, and after such submission it is impossible that we could hold that a French Court was not a Court of competent jurisdiction.

There can be no doubt that, whether right or wrong, the decision of the French Court was a decision on the merits, and there can also be little doubt that the matter directly adjudica

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ed upon by the French Court was the right of the first defendant to hold the very office of trusteeship.

It therefore follows that if the French territory could be regarded as the domicile of the Chidambaram and Mylam trusts, the decision of the French Court should be regarded as a decision by a Court of competent jurisdiction.

With regard to Chidambaram, the position is this. The whole of the property dedicated to the trust is situate in British India and all the trusts are also to be performed in British India. No doubt the trust may be regarded in a manner as made in French territory and the trustees are also French subjects. But in the case of such a trust on the reason of the thing the decision should, it seems to me, be that having regard to the entire trust property being in British India and the performance of the trust being also here, the trust should be regarded as a trust of British domicile or subject to the jurisdiction of British Courts. In other words, the office of trusteeship should be regulated only by British law.

There may be difficulties no doubt in the way of deciding what may be regarded as the domicile of the trust. But even with regard to the case of domicile of persons there are difficulties and the mere existence of difficulties need not deter a court of law from laying down the rules and principles applicable. If therefore the trust in respect of the Chidambaram charities was a trust of British domicile it follows that a French Court was not a Court of competent jurisdiction with regard to it and the decision of the French Court cannot operate as *res judicata* in respect of the Chidambaram charities.

If there is no binding adjudication with regard to the office of trusteeship by the French Court then it follows that we in this appeal have to decide with regard to the office. I have already held Ex. II to be genuine.

The question then is whether the appointment of the 1st defendant under Ex. II should be regarded as a mere confirmation of the appointment under Ex. I or as comprehending a fresh appointment, secondly, whether the appointment is valid and thirdly, whether it was a revocable appointment and has been validly revoked or not.

With regard to the first of these questions, it is no doubt true that in form the Ex. II would seem to be an instrument by which the appointment made under Ex. I was merely confirmed, but in substance it is not by any means merely such an instrument. By Ex. I the appoinment of the 1st defendant was

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to take effect after the lifetime of the appointer. Under Ex. I it would seem that the appointment was contemplated to take effect immediately even though the appointer reserved for himself certain rights of supervision over the management. The operative portion of Ex. II clearly includes and involves a fresh appointment by force or virtue of the instrument itself. Therefore any infirmity attaching to Ex. I cannot be regarded as continuing to attach to Ex. II. If it were necessary I should have been prepared to hold that there is nothing invalid about the appointment under Ex. II even though it may be regarded as amounting to a transfer of trusteeship. The principle on which such a transfer of trusteeship is forbidden by law is based primarily on the provisions of the trust deed and in the second place on the office of the trusteeship being regarded in law as *res extra commercium* and any transfer therefore of the office as being opposed to public policy. The proper view to take would be, having regard to all the terms of Ex. II. that the appointer did really intend the appointment to take full effect only after his death and that that was the reason why while he contemplated the appointee taking charge of and looking after the charities at once he should do so only under the supervision of the appointer.

In Ex. A the deed of trust relating to Chidambaram charities the provision is that "after the said Ayyasami Mudaliar the persons appointed by him shall conduct the aforesaid charities". In Ex. II Murugiah the appointer refers to the fact that he is advanced in age and the implication is necessarily that he is making the appointment because he is advanced in age and unable himself to look after properly the management of the charities. Though the document would in terms seem to constitute an immediate transfer of the office still, it is significant that the appointer reserves to himself rights of supervision.

The question then is whether, having regard to the entire nature of the document and the circumstances under which it was made, it can be regarded either as a violation of the provisions of the deed of trust or as being against public policy. It seems to me that it cannot be. Though under the instrument of trust the trustee is authorised to appoint his successor to carry on the management after his lifetime, still it cannot be so construed as to deprive the trustee of the power of appointing a successor *bona fide* if for reasons of illness, age or other infirmity he should really become and be incapable of carrying on satisfactorily the management of the trust. Such a construc-

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tion would be calculated to defeat the very purpose of the provision.

As regards such an appointment being against public policy, one can appreciate the argument if the transaction was one really of the alienation of the office for consideration or for any other ulterior personal advantage to the appointer himself, or even on the ground of any motive other than the benefit of the trust. But when the document purports merely to effect an appointment in exercise of the power possessed or given there is nothing in the circumstances to indicate that it was anything but a *bona fide* exercise of the power. It seems to me that the appointment, though intended to take effect immediately, cannot be regarded as opposed to public policy. There is nothing in public policy which requires that a man who can appoint his successor after his lifetime may not so appoint during his lifetime. It depends really on the provisions of the instrument of trust. I am satisfied that it was a *bona fide* exercise of the power. It has been held in many cases that even alienations of offices to persons next in the order of succession may be regarded as not opposed to public policy.

Applying a similar principle to this case I do not see what there is opposed to public policy in a trustee, who can appoint his successor after his death, appointing one there and then to look after the office because he the appointer has become old and incapable of looking after the management properly. But it is not really after all necessary for me to express any final decision on this point because there is the further question of the revocation of the appointment by the appointer. It has been contended on behalf of the appellant that under Exhibit D Murugiah should himself at the time of his death appoint a person to administer the *dharmams*. There are no such limitations as to the time of appointment in the original deed of trust Exhibit A. It is therefore very doubtful whether it is open to one trustee appointing a successor under the power of appointment to seek to lay further limitations on the exercise of the power. No cases have been cited and no legal principle was relied upon in support of any such contention. But even assuming that the limitation would be valid, it cannot be said that the expression "at the time of his death" means actually at the exact moment of death, but could be regarded merely as indicating that the appointment should be made having regard to all the circumstances at the end of his life, or at the time when there is reasonable apprehension of early termination of life.

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It has been argued for the respondents that the power of appointment once exercised the appointment cannot be revoked, and for this purpose some decisions in English cases were cited and relied upon. On an examination, all the cases turned out to be cases merely of the exercise of the power of appointment in respect of private rights and benefactions. No doubt when the power is given to be exercised in favour of private persons, the exercise of the power must be *bona fide* but on such exercise rights are created, and as the intended rights or benefits have thereupon accrued and there being no power to divest such right or take away such benefit, the power of revocation has been refused to be recognised except when specially given and also specially reserved. But the ground of such a rule or principle is not applicable to the case of what is clearly a public trust. The exercise of the power of appointment of a trustee cannot be regarded as a benefit to the donee or the appointee. The public are the beneficiaries and the exercise of the power is in the interests of the trust. The very reason of the thing would require that there should be power of revocation till the moment the appointment is intended to take effect. To hold otherwise in the case of public trust would lead to disastrous results and the appointing authority would have merely to look on and remain helpless if it should once make the appointment and find thereafter sufficiently early before the appointment takes effect that for some reason the appointee is or has become absolutely unfit to hold the office. Having regard therefore to what may be regarded as the general scope and purpose of the power of appointment in this case I must refuse to regard as applicable the technical rules relating to the exercise of power in the case of private rights and parties. If, however, it should be regarded that the provision that the appointment should be made only at the time of the death of the appointer was binding on Murugiah, then it follows that any appointment made before the apprehension of death except at the time of death cannot be regarded as valid or can only be valid as a provisional appointment subject to confirmation or revocation. But I for my part am disposed to base my judgment on the broader ground that in the case of public trust, power of appointment, unless there is something to the contrary in the instrument of a trust itself, should be regarded as a power to be exercised at or about the time when the appointment is to take effect having regard to the state of things then and that therefore any appointment so called previously made is in its very

nature revocable. There can be no doubt in this case that there has been a revocation of the appointment. It cannot also be said that such a revocation was made *mala fide* because it cannot be said that a trustee who sees the appointee rushing to grab the rights in the manner that the first defendant did, was wrongly regarded by the appointer as unfit. In any case that Murugiah acted really *bona fide* in the interests of the trust is amply borne by his seeking thereafter to appoint only some member of the family who would accept the office undertaking to manage the charities and it was only when he failed in his attempts to get a member of his own family to take up the management he appointed finally the plaintiff, his son-in-law.

I therefore agree in the conclusion that in respect of the Chidambaram charities there has been a valid appointment of the plaintiff by Murugiah and that the 1st defendant had no such right at the time of the appointment of the plaintiff as would prevent the appointment of the plaintiff from taking effect.

As regards what are called the Mylam charities they are called so because the suit is instituted in a British Indian Court. It is clear that all the items of property except a very small item are admittedly in French territory, and most of the charities to be performed under the trust are also in French territory. It has also been admitted before us that the part of the charities to be performed within British India is not separable from the rest of the trust. The trust had its origin in French territory and the domicile of the trustee is also in French territory.

Having regard to all these circumstances, it seems to me that we must come to the conclusion that what may be called the domicile of the trust is French territory and not British India. If so, it follows that the French Court was a Court of competent jurisdiction and that the decision of that Court with regard to the appointment of the 1st defendant and the recovery by him of the office in respect of the said charities is covered by S. 13 of the Civil Procedure Code.

In the result therefore I agree that so far as the Alappakkam and Mylam charities and the properties pertaining thereto are concerned, the plaintiff's suit must be dismissed and that so far as the Chidambaram charities are concerned, the decree of the lower court should be reversed and there should be a decree in favour of the plaintiff. I also agree to the order as to costs.

A. S. V. *Appeal partly allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Konammal .. *Appellant** (*Plaintiff*)

v.

Annadana Jadaya Gounder .. *Respondent* (*Defendant*).

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Konammal v. Annadana Jadaya Gounder.

Hindu Law—Impartible estates in Southern India—Succession — Joint family property—Onus of proving separation—Effect of partitioning partible property—Separate food and worship—Tarwad property—Joint Hindu family, right of adult member to become divided in interest.

Impartible estates in Southern India are the creatures of custom, and where no special custom is proved, the customary law of succession is to be found in the Mitakshara, with such qualifications only as flow from the impartible nature of the subject, and consequently, in applying this law the impartible estate, though in the sole enjoyment of the holder, is to be regarded for the purposes of succession as the joint property of the holder and his family and as passing by survivorship, unless it is shown to be the separate property of the holder or his branch, in which case it is descendible according to the rules of the Mitakshara as to separate property.

For purposes of succession an impartible estate may be joint family property, notwithstanding the circumstance that the holder for the time being has an unrestricted right of alienation *inter vivos* or by will. *Baijnath Prashad Singh* v. *Tej Bali Singh*, (1921) L. R. 48 I. A. 195 : I.L.R. 43 A. 228 : 40 M. L. J. 387 (P. C.), relied on. [*See also* the recent pronouncement of the Judicial Committee in *Protap Chandra Deo* v. *Jagadish Chandra Deo*, (1927) L. R. 54 I. A. 289 : 53 M.L. J. 30 (P. C.).—K. J. R.].

In order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate. In other words, the test applicable is, whether the facts show a clear intention to renounce or to surrender all interest in the impartible estate.

Where an impartible *zemindari* has been acquired by the last holder or his branch as a self-acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. On the other hand, it is also well settled that as regards an impartible estate which was or had to be considered joint family property, a member of the joint family might become separate with regard to it so as to lose his right to succeed to it by survivorship.

Inasmuch as for the purposes of succession an impartible estate may be joint family property, the fact that the members of the joint family or of any branch of the family have exercised their right of partition over their *partible* property would not necessarily divest them of their interest in the impartible estate over which they have no right of partition. "There is nothing in the fact of these partitions of their partible property to suggest any intention of renouncing their rights of succession to the impartible estate. Further, to lay down that members of a joint family could not partition their partible property without losing their rights of succession in the impartible estate would impose on these families a restriction on the free right to

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partition which has been so fully recognized by the decisions of this Board in recent years".

It being established in the present case that the impartible estate in question was at one time the joint property of a family consisting of the descendants of the common ancestor of the defendant and the last holder, the *onus* lay on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in this estate was determined so that it became the separate property of the last holder's branch. The Trial Court (District Judge) held that the estate was the separate property of the last holder, but the High Court, differing from the District Judge, came to the conclusion that no separation had been proved, and that the first defendant was entitled to succeed, as the estate had not ceased to be the joint property of the family of the last holder and the first defendant. The Judicial Committee, in concurring with this decision of the High Court, added: "In Southern India evidence as to separate food and the absence of joint worship is of very little weight. As regards worship, there is practically no joint family worship. Similarly, as regards food, it is not the practice for the junior branches of the family to live with the owner of an impartible estate, and no inference as to separation can be drawn from separate living".

In Malabar, where all joint property is impartible, it is a matter of everyday occurrence for a female member of the *tarwad* and her descendants to acquire and hold property as a *tahvis* or *sub-tarwad* without their rights of property in the main *tarwad* being in any way affected.

The decisions of the Judicial Committee in recent years give full recognition to the free right to partition and affirm the right of any adult member of a joint Hindu family to become divided in interest as to his share in the joint property by a clear expression of his intention to divide. *Palani Ammal* v. *Muthuvenkatacharla Moniagar*, (1924) L.R. 52 I. A. 83 : I. L. R. 48 M. 254 : 48 M. L. J. 83, referred to.

Judgment of the High Court affirmed.

Appeal (No. 31 of 1924) from a judgment and decree of the High Court, Madras (Krishnan and Ramesam, JJ.), dated the 26th October 1922, which varied the decree of the District Court of South Arcot, dated the 17th December 1920.

The facts of the case are set out in their Lordships' judgment. The case in the Court below is reported in *Annadana Jadaya Gounder* v. *Konammal* (1).

K. V. L. Narasimham for appellant.

De Gruyther, K.C., and *Brown* for respondent.

Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS :—This litigation is concerned with the right of succession to the Jadaya Gounder Jaghir or Chinna Tiruppadi Hill Polliem, as it was formerly known, in the South Arcot District of the Madras Presidency. These ancient polliems in Southern India have always been held to be impartible, and this estate has now been included in the schedule of impartible estates to the Madras Impartible Estates Act II of 1904.

1. (1922) 17 L. W. 107.

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It is therefore according to the definition in section 2 of the Act " an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India," and the proprietor of the estate is " the person entitled to the possession thereof as single heir under the special custom of the family or locality in which the estate is situated, or, if there be no such family or local custom, under the general custom regulating the succession to impartible estates in Southern India."

This statutory definition would appear to be in entire accordance with what has often been laid down by this Board, that these impartible estates are the creatures of custom, and with the decision in the *Shivagunga case* (2) that where no special custom is proved, the customary law of succession is to be found in the Mitakshara, which is the general customary law in this part of India, " with such qualifications only as flow from the impartible nature of the subject," and that consequently, in applying this law the impartible estate, though in the sole enjoyment of the holder, is to be regarded for the purposes of succession as the joint property of the holder and his family and as passing by survivorship, unless it is shown to be the separate property of the holder or his branch, in which case it is descendible according to the rules of the Mitakshara as to separate property.

In this case the first plaintiff, who is the mother of the last holder, claims the estate as the nearest heir to his separate property, whereas the defendant, who is a distant male agnate, claims to succeed to it as joint family property.

The plaint included an alternative claim by the second plaintiff, who is the son of the first plaintiff's sister under a will made by the last holder. This claim has been rejected rightly in both the lower Courts as section 4 of the Impartible Estates Act restrains the proprietor from making any alienations to enure beyond his own lifetime except for necessary purposes, except in so far as sub-section (3) preserves his right to provide for the succession to the estate in default of heirs.

As regards the first plaintiff's claim, the District Court held that the estate was the separate property of the last holder

(2) (1863) 9 M. I. A. 539.

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and decreed her suit, but this decree was reversed by the High Court of Madras, who held that the first defendant was entitled to succeed, as the estate had not ceased to be the joint property of the family of the last holder and the first defendant.

It will be convenient in the first place to refer briefly to the history of the estate, to set out the pedigree showing the descent from a common ancestor, and to show how the present case arose.

It appears, as the result of inquiries made by the Inam Commission in the 'sixties of the last century, the results of which are embodied in the Inam Register, Ex. 3, that the estate consists of forty villages in the hilly tracts of the Kallikurichi taluq of South Arcot, and had been granted by a former government for services rendered to one Ramappa Jadaya Gounder, a remote ancestor of the then Poligar Lakshmanappa Jadaya Gounder.

It is also recorded in the Register that in 1813, shortly after the introduction of British Rule, the then Poligar was recognised as exempt from payment of revenue. In view of this fact and of the long and undisturbed enjoyment of the family, it was recommended that the forty villages, which are described in the Register as *serva* or tax free inam, should be enfranchised subject to the imposition of an annual quit rent of one-eighth of the income then derived from them by the Poligar, which was treated as the assessment in view of the fact that the villages had never been surveyed or assessed. Under the very primitive conditions, which still exist, the income of Rs. 1,800 was shown to be derived from a plough tax, certain poll taxes, and jungle rent and tree tax. The recommendation was adopted by the Inam Commissioner on the 22nd October, 1868, and an inam patta or permanent grant was accordingly issued to the Poligar.

The following pedigree taken from the judgment of Ramesam, J., in the High Court, shows the descent of the family from the common ancestor, the Poligar Lakshmanappa Jadaya Gounder, who died in 1822.

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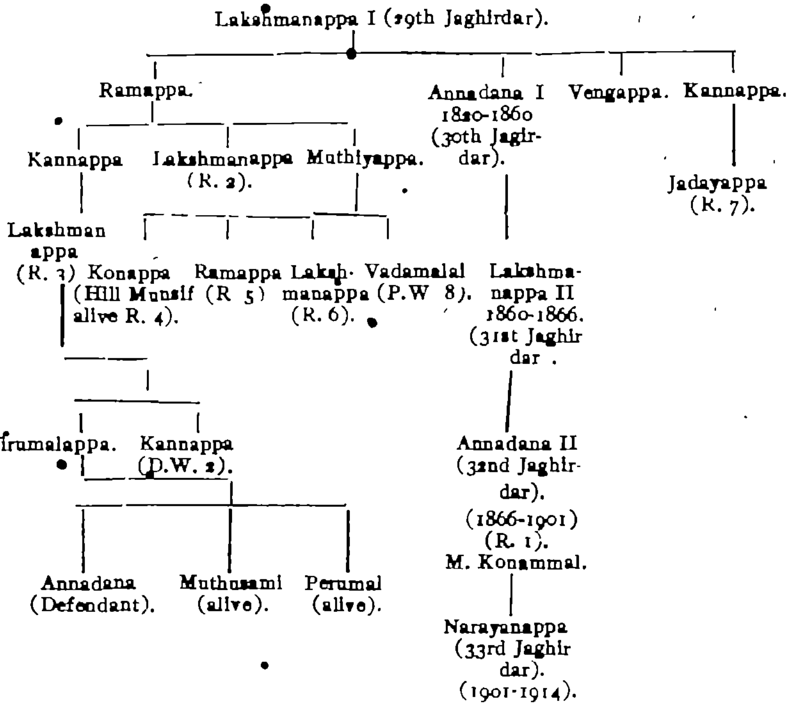

The letters R. 1, R. 2 show the persons entered under the heading "Surviving heirs of the present incumbent" in the order mentioned in the Inam Register already mentioned.

Lakshmanappa I, who died in 1822, was succeeded by his second son Annadana I, described as the 30th Jaghirdar, who died in 1860. The circumstances under which his elder brother Ramappa was set aside were investigated in the suit brought in 1875 by Annadana's grandson Annadana II, the 32nd Jaghirdar, to recover the estate from his cousin Lakshmanappa who was the grandson of Ramappa and grandfather of the first defendant here, and had taken possession of the estate during his minority and claimed to be rightful heir.

In that case the High Court in Reg. Appeal 116 of 1876, on appeal from the judgment of the Subordinate Judge at Cuddalore in O.S. No. 7 of 1875, were inclined to think that in 1820, two years before his death, Lakshmanappa I had relinquished the estate to his second son Annadana because his eldest son Ramappa was of weak intellect and Ramappa's son Kannappa, if then born, an infant of tender years ; and they found as a fact that by an arrangement between the Poligar

and the adult members of his family the Polliem was transferred to his second son Annadana, and that information of this was given to the Revenue officials and was recorded by them. They found also that after Annadana's death in 1860 he was succeeded as of right by his son Lakshmanappa II *alias* Narayanappa, and that his claim was not challenged by the defendant in the suit, who was then 33 years of age.

The High Court also found that at the death of the Poligar Lakshmanappa *alias* Narayanappa in 1866, leaving a son Annadana, then aged 3 years, the defendant had succeeded in getting himself recognised and installed as Poligar, but that what happened did not give validity to the defendant's title or affect the plaintiff's right to hold the estate which by inheritance had passed to him on his father's death. There was thus a clear decision that as between the two branches the right of succession was in the junior branch. It is also clear, and has been rightly decided by the lower Courts, that no question arose in that case as to whether the effect of the supersession of the senior line in 1820 had the effect of separating them from the junior branch, and that consequently that question is not *res judicata* in the present case by reason of the judgments in that case.

The Inam Register, which was compiled before 1866, shows the Poligar as still residing on Chinna Tiruppadi Hill, but some time prior to the institution of the suit just referred to the minor's mother removed him to the plains ; and he afterwards took up his residence there in the village of Akkarayapalaryam. The remaining members of the family continued to reside in the family home at Chinna Tiruppadi, which consisted of a number of thatched buildings, one of which, known as the kutcheri or office, was allowed to fall into ruins after the Poligars had ceased to reside there. The Jaghirdar Annadana II died in 1901, and was succeeded by his son Narayanappa, who died in 1914, when this branch of the family became extinct in the male line. Thereupon Annadana, the present defendant, who belongs to the senior branch of the family took possession of the estate claiming to have succeeded by survivorship, and was subsequently sued by Narayanappa's mother, Konammal, the present plaintiff, who alleged that the estate was the separate property of her deceased son and that she was entitled to succeed to it.

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The onus of proving that the estate had become the separate property of the junior branch was on the plaintiff, who based the claim in the plaint on the following grounds: (1) That Annadana (the 30th Jaghirdar) and his descendants had all along owned and held the estate as their separate and absolute property; (2) that they had also acquired a title by adverse possession; (3) that the 1st defendant's claim was barred by *res judicata* by reason of the judgments and decrees of the Small Cause Court at Cuddalore in 1875, and of the High Court of Madras in 1876; (4) that the late Jaghirdar and his ancestors were separated from Ramappa and his descendant, and in any case after the proceedings of 1876 and by their subsequent conduct there had been a complete separation between the two branches; and (5) that the late Jaghirdar and his ancestors had been holding the estate as their separate and absolute estate to the knowledge and with the acquiescence of the senior branch.

All these allegations were denied by the 1st defendant and formed the subject of the 3rd, 4th and 8th issues which cover all the questions raised before their Lordships.

3. Was the Jaghir held by Annadana Jadaya Gounder and his descendants as their separate estate and absolute property asserting an exclusive title to themselves?

4. Has there been a separation of status between the different branches of the family, as alleged by the plaintiffs, or are the families still joint?

8. Is the 1st defendant's claim to succession affected by the rule of *res judicata* by the decision in O. S. 7 of 1875 in the file of the Sub-Court (Small Cause Court?), Cuddalore? This issue has already been disposed of.

As to what constitutes separation, it is clear that where an impartible zemindari has been acquired by the last holder or his branch as a self acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. That was what happened in the *Shivagunga case* (2). On the other hand, it is also well settled that as regards an impartible estate which was or had to be considered joint family property, a member of the joint family might become separate with regard to it so as to lose

(2) (1863) 9 M. I. A. 539.

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his right to succeed to it by survivorship. That is what happened in *Periasami* v. *Periasami* (3), where a member of the joint family, believing himself to be next in succession to the larger zemindari of Shivagunga, joined in a settlement under which he was held to have renounced all claims to the lesser zemindari. Or, again, an impartible zemindari might by consent be settled on a particular branch of the family as their separate property, as in *Ranganayakamma* v. *Ramaiya* (4).

The question in the present case is whether the evidence shows that the estate had become the separate property of the junior branch ; and it may at once be observed that in dealing with it the District Judge was at a disadvantage, as compared with the High Court, because he had not the guidance of the judgment of their Lordships delivered by Lord Dunedin in *Baijnath Prashad Singh* v. *Tej Bali Singh* (5). Prior to that decision the authority of the earlier cases which proceeded on the footing that the estate though impartible must still be regarded as joint family property for the purposes of succession had been shaken by the decisions of the Board in *Sartaj Kuari's* case (6) and the first and second *Pittapur* cases, *Venkata Rao* v. *Court of Wabds* (7) and *Raja Rama Rao* v. *Rajah of Pittapur*, (8) in which it was held that the holder for the time being had an unrestricted right of alienation *inter vivos* or by will and that the junior members of the family had no right to maintenance out of the estate not based on custom.

Further, in the Courts below the appellant relied on two decisions of this Board not long before Lord Dunedin's judgment, *Thakurain Tara Kumari* v. *Chaturbhuj Narayan Singh* (9) and the *Bettiah Raj case* (10). In the former case it was held that an impartible estate had become the separate property of one branch of the family by reason of a number of facts showing that the two branches had become separate. This case cannot now, in their Lordships' opinion, be treated as laying down any proposition of law for the purposes of the

(3) (1878) L.R. 5 I.A. 61: I.L R. 1 M. 312 (P.C.) (4) (1879) 5 Cal. L.R. 439.
(5) (1921) L. R. 48 I. A. 195 : I.L.R. 43 A. 228 : 40 M. L. J 387 (P.C.).
(6) (1888) L R. 15 I. A. 51 : I L.R. 10 A. 272 (P. C.).
(7) (1899) L. R 26 I. A. 83 : I. L. R. 22 M. 383 : 9 M. L. J. (Supp.) 1 (P. C.).
(8) (1918) L. R. 45 I. A. 148: I. L. R. 47 M. 778: 35 M. L. J. 392 (P. C.).
(9) (1915) L R. 42 I. A. 192 : I. L. R. 42 C. 1179 : 29 M. L. J. 371 (P. C.).
(10) (1920) 24 C. W. N. 857. (P. C.).

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present case, as it does not deal with the question whether an impartible estate is to be treated for purposes of succession as joint family property or with the legal consequences that follow if it is.

The *Bettiah Raj case* (10) went much further and contains observations denying that the junior members of the family have any coparcenary interest in the impartible estate even for purposes of succession, but these observations have been explained in Lord Dunedin's judgment.

In the light of these authorities the District Judge, on a consideration of the very voluminous but often irrelevant evidence adduced by both sides, as to the Jaghirdar's relations with the other members of the family from the time the defendant's ancestor was set aside in favour of his younger brother, arrived at the conclusion stated in paragraph 94 of his judgment, that there was not the slightest reason to believe that the family of the defendant and that of the Poligar were joint or had been joint for a long time.

When the case came before the High Court the whole question had been reconsidered in the judgment delivered by Lord Dunedin in *Baijnath Prashad Singh* v. *Tej Bali Singh* (5) and it had been laid down that the earlier decisions as to the right of succession were not affected, and were not intended to be affected by the line of decisions already mentioned, and that for purposes of succession an impartible estate must still be considered joint family property unless it were shown to be separate. It being established in the present case that this impartible estate was at one time the joint property of a family consisting of the descendants of the common ancestor of the defendant and the last holder, it is in their Lordships' opinion incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in this estate was determined so that it became the separate property of the last holder's branch.

Now reviewing the cases which are collected and examined in the careful and exhaustive judgment of Ramesam, J., in the High Court, or referred to in the argument before their Lordships, it will be found that in the early decisions of the Board, which have now been reaffirmed in the leading case, the

5. (1921) L. R. 48 I. A. 195 : I. L. R. 43 A. 228 : 40 M. L. J. 387 (P.C.).
10. (1920) 24 C. W. N. 857 (P.C.)

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test applied was whether the facts showed a clear intention to renounce or to surrender all interest in the impartible estate.

Thus in *Chowdhry Chintamun Singh* v. *Musamat Nowlukho Konwari* (11) where there had been to some extent a separation in the family, it was held that the question was, whether the plaintiff's father and his branch had waived the right of succession and had impressed upon the taluqa the character of separate property.

Again, in *Periasami* v. *Periasami* (3) it was held on the facts that Muthu Vaduganatha Tevar, conceiving that he was entitled to succeed to the important zemindari of Shivagunga, had renounced for himself and his offspring all interest in the small and dependent Palaiyam of Padamatur, thus, in the words of their Lordships in the second *Naragunty Palaiyam case* (12) "manifesting his intention to separate himself and his descendants completely from the Palayam." On the other hand, in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (13) it was held that when Bapamdora, a junior member of the family drove out the fifth Mansabdar, who had quarrelled with bis overlord and involved the family in difficulties, and himself became the sixth Mansabdar, he must be held to have taken possession for the undivided family, and that it had not thereby become the separate property of Bapamdora himself and his descendants, so as to exclude the other members of the family from the right of succession. Similarly in the *Naragunty case* (12) (*supra*), where the elder brother, Krishnappa, had stood aside and allowed his junior brother, Kuppi, to assert and to enforce the claims of his branch to succeed to the Polliem, their Lordships held that this transaction did not render the impartible estate the separate property of Kuppi and his line, but was "consistent with the enjoyment by the other members of the family of their coparcenary interests represented by their enjoyment of maintenance and possibility of succession", and later on when construing a deed executed by the elder brother, their Lordships observed that it "cannot be held that he intended to renounce all claim on the part of himself and his heirs to the succession if it opened by reason of the extinction of the line of Kuppi."

3. (1878) L.R. 5 I.A. 61 : I. L. R. 1 M. 312 (P.C.).
11 (1875) L.R. 2 I.A. 263 : I.L.R. 1 C. 153 (P. C.).
12 (1888) I. L. R. 4 Mad. 250. 13 (1870) 13 M. I. A. 333.

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Those authorities, in their Lordships' opinion, go far to support the inference deduced by Ramesam, J., from an examination of the cases that in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate.

Their Lordships will now proceed to deal with the grounds of separation relied on in this case. It is, in their Lordships' opinion, clear upon the foregoing authorities that the fact that the defendant's ancestor was set aside in favour of the younger brother, Annadana and his line in 1820 in the circumstances already stated, is not of itself sufficient to show that Ramappa's line thereby lost their rights as members of the joint family to succeed to the estate on failure of Annadana's line.

It only remains to be considered whether anything else has happened to produce such a result. It was contended for the appellant that, though there had never been any formal partition, the evidence showed that there had been a separation between the senior and the junior branches of the family, and also that the defendant's branch had become divided *inter se*, and that, in either event, the defendant's branch had lost their right of succession to the estate. Now once it is established—as it must now be taken to be—that for the purposes of succession an impartible estate may be joint family property, it is difficult to see upon what principle the fact that the members of the joint family or of any branch of the family have exercised their right of partition over their partible property should be held to divest them of their interest in the impartible estate over which they have no right of partition. It certainly cannot be put upon the ground of surrender or renunciation, for there is nothing in the fact of these partitions of their partible property to suggest any intention of renouncing their rights of succession to the impartible estate, nor do they receive any consideration for such renunciation. In Malabar, where all joint property is impartible, it is a matter of every day occurrence for a female member of the tarwad and her descendants to acquire and hold property as a tahvizi or sub-tarwad without their rights of property in the main tarwad

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being in any way affected. Further, to lay down that members of a joint family could not partition their partible property without losing their rights of succession in the impartible estate would impose on these families a restriction on the free right to partition which has been so fully recognised by the decisions of this Board in recent years. Those decisions which have been cited for the appellant, affirm the right of any adult member of the joint family to become divided in interest as to his share in the joint property by a clear expression of his intention to divide, but there would not appear to be anything in these decisions of which the latest is *Palani Ammal* v. *Muthuvenkatacharla Moniagar* (14) to support the plaintiff's contention. On the other hand it is in conflict with the express decision of this Board in the *Challapalli* case [*Mallikarjuna Prasada Nayudu* v. *Durga Prasada Nayudu* (15)]. In that case the plaintiff, who had sued for partition of a zemindari and other properties, and had failed as to the zemindari, which was held to be impartible, but had succeeded as to the other properties, was held not to have lost thereby his right to sue for maintenance out of the impartible estate on the ground that it had become the separate property of the holder. "It is true," their Lordships say, " that in that suit a a decree was made for partition of a portion of the family property, but it was a very inconsiderable portion, ***and had no relation whatever to the zemindari estate***." It has been contended that the weight of this decision is affected by the fact that it recognises a right of the junior member to maintenance which has since been negatived by the decisions of this Board. It is, however, clear that exactly the same question would have arisen if the claim had been to succeed as next heir instead of for maintenance, and that the decision would have been the same way.

In the present case the High Court, differing from the District Judge, have held that no separation has been proved either between the two branches or between the members of the first defendant's branch ***inter se***. Their Lordships agree with that decision. A great deal of evidence had been adduced in in the Trial Court as to whether the two branches had continued joint in food, worship and estate. Ramesam, J., a Hindu Judge necessarily of great experience in such matters,

(14) (1924) L. R. 52 I. A. 83 : I. L. R. 48 M. 254 : 48 M. L. J. 83 (P. C.).
(15) (1900) L. R 27 I. A. 151 : I. L. R. 24 Mad. 147 : 10 M. L. J. 294 (P. C.)

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has pointed out that in Southern India evidence as to separate food and the absence of joint worship is of very little weight. As regards worship, there is practically no joint family worship, and the evidence which was adduced as to whether or not the defendant's branch had any part assigned to them in the annual festival of the local temple in which the Jaghirdar took a prominent part had no bearing on the present question. Similarly, as regards food, Ramesam, J., has pointed out that it is not the practice for the junior branches of the family to live with the owner of an impatible estate, and that no inference as to separation can be drawn from separate living. In the present case, what happened was that the members of the first defendant's branch continued to live in the old family residence on Tiruppadi Hill in houses closely adjoining the so-called palace of the Jaghirdar, while the Jaghirdar ceased to reside in the hills and acquired a new residence more to his taste in the plains. The position of the junior members was in no way altered ; they went on living as they did before, and continued to enjoy the privilege of cultivating land free of the plough tax and poll tax levied on the other inhabitants, a privilege which in the primitive conditions obtaining in these hills was equivalent to maintenance. They also on such occasions as marriages as members of the Jaghirdar's family received contributions from the inhabitants of the same kind as those received by the Jaghirdar himself.

As regards the alleged separation of the members of the first defendant's branch *inter se*, the evidence was equally unsatisfactory. One of them, a Hill Munsif, and his brother went to live where their duties and business took them. There was also some evidence that some members of this branch of the family purchased provisions in the plains, it was suggested, on their own account, and also effected some sales of produce.

Their Lordships agree with the learned Judges of the High Court that this is evidence of a very trivial and inconclusive kind. As pointed out for the respondent, the facts proved in this case are not nearly so strong as the facts which were held by the Board to be insufficient to establish separation in *Chowdhry Chintamun Singh* v. *Musamat Nowlukho Konwari* (11) and *Sri Raja Virarava Thodhramal Rajya*

(11). (1875) L. R. 2 I. A. 263 ; I.L.R. 1 C. 153 (P.C.).

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Lakhsmi Devi Garu v. *Sri Raja Viraram Thodhramal Surya Narayana Dhatrasu* (16). In the latter case there had been separate living for no less than seventy years.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondent : *Douglas Grant and Dold.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS, AND SIR LANCELOT SANDERSON.

P. C. Chockalingam Chettyar v. E. N. M. K. Chettyar Firm.

V. P. R. V. Chockalingam Chettyar .. *Appellant* * *(Plaintiff)*

v.

E. N. M. K. Chettyar Firm and others .. *Respondents (Defendants.).*

Indian Trusts Act, 1882. *S.* 5—*Description of property—Indian Registration Act* (1908), *S.* 21.

Where a deed of trust in relation to immoveable property is registered (see S. 5 of the Indian Trusts Act, 1882), the instrument must contain a description of such property sufficient to identify the same, as required by S. 21 of the Indian Registration Act, 1908.

Appeal (No. 8 of 1927) from a judgment and decree of the High Court, Rangoon (Rutledge and Brown, JJ.), dated the 29th September, 1925, confirming a decree of the District Court of Pegu, dated the 7th June, 1924.

The material facts are stated in their Lordships' judgment.

Parikh and *Pennell* for appellant.

Sir George Lowndes, K. C., and *Raikes* for respondents.

Sir Geo. Lowndes for the respondents argued that the immoveable property was not specifically mentioned

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* P. C. Appeal No. 8 of 1927. 6th December, 1927.

16 (1897) L.R. 24 I. A. 118, I.L.R. 20 M. 256 (P. C.).

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in the trust deed. He referred to Ss. 17, 21, and 28 of the Indian Registration Act and contended that immoveable property of the value of Rs. 100 and upwards could only be transferred by a registered document. Here the document contains no description at all.

[LORD SINHA :—In fact there is no mention at all of the property in the trust deed.

SIR JOHN WALLIS :—Some part of the property must be situate in the registry district. The question of registration apparently occurred to no one in the case before.]

Parikh, in reply, objected that the question of registration should not be taken up at this late hour, as it was not mentioned in the Courts in India nor in the respondents' "case".

(Their Lordships considered that it was a point of law which could be urged for the first time in argument.)

You have to look at the Indian Trusts Act.

[SIR JOHN WALLIS :—Do you say that registration is not necessary ?]

No, but I contend that we must be guided solely by the Trusts Act and cannot bring in the provisions of the Registration Act.

[SIR JOHN WALLIS referred to the definition of 'registration' as given in S. 3 of the Indian Trusts Act.

LORD SINHA :—Is it your point that you do not require a registered instrument for conveying property in trust?

SIR JOHN WALLIS :—The procedure for registering documents is to be found in the Registration Act.

LORD ATKINSON :—Sir Geo. Lowndes' point is that this property is not in the trust deed at all. The whole purpose of the Registration Act is that people can come to the Registry Office and get information as to encumbrances on the property. That is the very object of the Registration Act.]

In India, there is no registration of title.

Counsel urged that the question of registration was never raised in India. He referred to S. 5 of the Trusts Act.

Counsel read the definition of "trust" in S. 3 of the Trusts Act and contended that the trust deed here satisfies the requirements of that definition.

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Their Lordships' judgment was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiff against a judgment and decree, dated the 29th September, 1925, of the High Court of Judicature at Rangoon, which affirmed a judgment and decree of the District Court of Pegu, dated the 7th June, 1924, by which the plaintiff's suit was dismissed with costs.

The suit was instituted in November, 1922, and thereby the plaintiff prayed for a declaration that he was the owner of the properties described in the schedule to the plaint, delivery of possession of the said properties, and mesne profits.

The material facts were as follows :—

An undivided Hindu Chetty family of Pallatur in the Ramnad district of Madras, carried on an extensive money-lending business under the style of the K. P. firm in different places, including Pegu, in Burmah—and one, K. P. Ramanathan Chetty, was the Karta or manager thereof.

On the 10th February, 1906, the said K. P. Ramanathan Chetty, as the manager of the joint family, executed a power of attorney in favour of one Singaram Chetty, who was then at Pegu acting as agent for the firm under a salary agreement.

The power of attorney authorised Singaram to act under the style of Kana Pana, or K. P. Singaram Chetty, to use the name of Ramanathan Chetty and, amongst other things, to sell or exchange all or any of the immovable property of or to which Ramanathan Chetty was or should at any time thereafter become possessed or entitled, for any estate or interest whatsoever or which he then had or at any time thereafter should have power to dispose of.

The properties in suit, which are situated at Pegu, belonged to the above-mentioned joint family, and were undoubtedly part of the subject-matter of the said power of attorney.

In 1908 the business of the K. P. firm was in a critical condition, and on the 6th April, 1908, a trust deed was executed between Ramanathan Chetty for himself, and as head and manager of the undivided family, and certain other members of the family of the one part, and V. M. Somasundaram Chettyar of the other part.

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Somasundaram was to collect the debts owing to the family, pay the creditors, and carry on the business.

By the terms of the deed Somasundaram was given "a right over, by way of trust, all the properties, assets and interests mentioned in schedules A and B," for the purpose of selling the same.

The trust deed contained other powers, such as management, the appointment and removal of agents, including the agents then working in the K. P. firm.

One, M. S. M. Maygappa Chettyar, was appointed co-adjutor to counsel and advise the trustee, and it was provided that the trustee should obtain the consent in writing of the co-adjutor before appointing agents, or selling or mortgaging immovable properties in connection with the trust.

It was further provided by Clause 21 of the deed that—

> "all properties, assets, claims and suits that may come under dispute (or to court) of the K. P. firm have in this way been transferred to the trustee. He has power to receive them as they are paid, to convert them all into money and, if convenient, to transfer (or assign) them to creditors."

In 1911 the co-adjutor mentioned in the trust deed died, and no other co-adjutor was appointed.

On the 4th January, 1912, Somasundaram, purporting to act as trustee by virtue of the powers conferred upon him by the above-mentioned deed, appointed Singaram Chetty his agent, to transact, conduct and manage the affairs, concerns and matters in which he was interested as trustee, and to use the name of Somasundaram Chetty, trustee to the said estate.

One the 23rd June, 1912, Singaram, by a registered deed of that date, purported to sell to E. N. M. K. Muttaya Chetty, the first respondent, for the consideration of Rs. 12,500, the properties in suit. This deed was not produced at the trial, but a copy of it was put in by consent of the parties at the hearing of this appeal.

The other respondents are purchasers of some of the properties from the first respondent.

On the 1st August, 1913, the trustee was discharged.

On the 7th January, 1918, on the application of a creditor, Ramanathan Chetty individually, and as managing member of the joint family, was adjudicated insolvent by the District

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Judge of Ramnad, who directed that all the personal assets of Ramanathan and the joint family assets should vest in the Official Receiver.

On the 26th January, 1920, the appellant bought the properties in suit at a public auction for the sum of Rs. 580, and the property was conveyed to him by two deeds, dated the 8th May, 1920, and the 7th December, 1921, and executed by the Official Receiver. The appellant instituted this suit, as already stated, on the 6th November, 1922, basing his title to the properties on the two above-mentioned sale deeds.

The first respondent relied upon his alleged purchase on the 23rd June, 1912.

The learned additional District Judge dismissed the plaintiff's suit with costs.

On appeal, the High Court held that Singaram continued as agent for the K. P. firm in the Pegu district from 1906 until after the conveyance to the first respondent, that the power of attorney granted in 1906 to Singaram continued unimpaired and uncancelled, and that he had ample power to convey the property and give a good title.

The High Court dealt with certain questions of fraud and collusion, to which reference need not now be made, as they have not been raised on the hearing of this appeal.

The learned counsel, who appeared for the appellant, relied mainly upon two points.

In the first place, it was contended that the power of attorney of 1906 in favour of Singaram came to an end by reason of the execution of the trust deed of the 6th April, 1908. It was argued that by the trust deed the whole of the property of the undivided family was transferred to the trustee, that Ramanathan and the family had thereby deprived themselves of all power to sell the property, and that thereafter as the principal had no power to sell, the agent, Singaram, likewise had no authority or power to sell the property.

It was also argued on behalf of the appellant that the power of attorney given by the trustee on the 4th January, 1912, was of no effect, as far as the sale of immovable properties was concerned, inasmuch as the trustee had not obtained the consent in writing of a co-adjutor to the sale thereof as provided by the deed.

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The last-mentioned point may be disposed of at once.

It was not seriously contended on behalf of the respondents that they could rely on the power of attorney executed by the trustee on the 4th January, 1912, as authority for the sale by Singaram of the properties, and their Lordships are of opinion that the appellant's contention on that point may be taken to be correct.

In the second place, it was argued that the trust did not come to an end when the trustee was discharged in August, 1913, that the Court on a proper application would have appointed another trustee, and that the property was still subject to the trust and vested in the trustee.

The learned counsel for the respondents replied to these points by arguing, first, that the trust deed of the 6th April, 1908, did not include the immovable property in Pegu which is now in suit, and secondly, that there was a finding of fact by both the Courts in India that the power of attorney in favour of Singaram, dated 10th February, 1906, had not come to an end, but that it was in force and of full effect at the time Singaram sold the property to the first respondent.

It is clear that the immovable properties in Pegu are not specifically mentioned in the trust deed.

The properties mentioned in Schedule A are situated at Pallatur and the other places mentioned therein, and they do not include the immovable properties at Pegu, the subject of this suit.

Schedule B includes "the firm under the mark of K. P. at Pegu and all the rights such as money-lending, &c."

The property mentioned in the schedule to the plaint consists of four lots of paddy land, two houses, and two lots of garden land—situated in Pegu.

In their Lordships' opinion the property so claimed in this suit cannot be said to be covered by the description of the properties in the above-mentioned two schedules to the trust deed.

This opinion is confirmed when reference is made to the provisions of the Registration Act III of 1877—which was in force at the time of the execution of the trust deed, dated 6th April, 1908. The deed was registered, and if it had been intended to make the immovable property at Pegu subject to the

trust for sale, it would have been necessary to insert in the deed a description of such property sufficient to identify the same, as was in fact done in the case of the property at Pallatur and other places referred to in Schedule A of the trust deed.

It was, however, argued on behalf of the appellant that the terms of Clause 21 of the deed, which have already been stated, are sufficient to vest all the property of the K. P. firm, including the immovable property at Pegu, in the trustee.

The deed has to be construed as a whole, and upon such a construction it is not possible, in their Lordships' opinion, to hold that the above-mentioned words are sufficient to transfer to the trustee the immovable properties at Pegu, which have not been mentioned in the deed or the schedule containing the description of the immovable properties which, it was intended by the parties, should be transferred to the trustee.

Their Lordships, therefore, are of the opinion that the properties, which are the subject-matter of the suit, were not transferred to the trustee by the deed of the 6th April, 1908, and that the authority given to Singaram to sell the property was not terminated by reason of the execution of that trust deed.

It was further argued on behalf of the appellant that Singaram was appointed agent at Pegu in 1905 by a salary agreement which usually exists for three years, that he returned to India in or about 1909, and that the power of attorney which had been given to him in 1906 must be considered to have come to an end when he left Pegu and returned to India.

It appears, however, that Singaram returned to Pegu in 1911 and again acted as agent for the K. P. firm.

The learned assistant District Judge, who tried the suit, held that the original power of attorney of 1906 in favour of Singaram was evidently never withdrawn or cancelled.

The High Court considered that it was clearly established that Singaram continued as agent of the K. P. firm in the Pegu district from 1906 until after the conveyance in question in the suit, and the learned Judges of the High Court were also of opinion that the trial Judge was fully justified on the evidence in holding that his powers under the power of

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attorney granted in 1906 continued unimpaired and uncancelled.

These are concurrent findings, and it was argued on behalf of the respondents that they are findings of fact, and, therefore, that their Lordships should not interfere with them.

It may be that, strictly speaking, the question, to which the findings are relevant, is not merely one of fact, and that the question whether the power of attorney of 1906 was still effective at the time Singaram conveyed the property to the first respondent is a mixed question of law and fact. However that may be, their Lordships, after consideration of the evidence see no sufficient reason for disagreeing with the above-mentioned conclusions of the two Courts in India in respect of this matter.

Their Lordships, therefore, are of opinion that Singaram had authority to convey the property and to give a good title to the first respondent, and that the appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *J. E. Lambert.*

Solicitors for respondents : *Bramall & Bramall.*

K. J. R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice,* MR. JUSTICE WALLACE, MR. JUSTICE BEASLEY, MR. JUSTICE JACKSON AND MR. JUSTICE SRINIVASA AYYANGAR.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

T. K. E. Ibrahimsa Ravuttar .. *Assessee.*

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Commissioner of Income tax, Madras v. Ibrahimsa Ravuttar.

Income-Tax Act, 1922, S. 4, clause (3), Sub-clause (8)—Agricultural Income—Meaning of—Mortgage with possession of lands used for agricultural purposes and lease back again of the same to the mortgagor—Rent payable by mortgagor—Lessee under lease—Assessability to income-tax of.

An assessee took a usufructuary mortgage of lands used for agricultural purposes and leased them back again to the mortgagor. The mortgage was a simple usufructuary mortgage, there was no stipulation in it as to any interest; and the

* Refd. Case No. 11 of 1927. 1st February, 1928.

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income accruing from the lands mortgaged was to be taken and enjoyed by the mortgagee. On a question arising as to whether the amount agreed to be paid as rent by the mortgagor-lessee was assessable to income-tax, *held*, by the majority of the Full Bench, that the rent reserved was agricultural income within the meaning of S. 4, Cl.(3), Sub-clause 8 of the Income-Tax Act, and was not assessable to income-tax.

There is no warrant for the contention that agricultural income in S. 4, Cl. (3), Sub-clause (8), must be construed as referring only to such agricultural income as is not capable of being properly designated as income from business.

A subject is entitled, if he can in any legal manner, to circumvent a taxing Act.

Per *Jackson, J., dissenting*:—The mortgage and lease were parts of one and the same transaction, which, viewed as a whole, is one by which the money-lender obtains interest on the money advanced. There was never any real transfer of possession, and the so-called rent has nothing to do with agricultural purposes, being entirely based upon the money lending firm's rate of interest. It is not agricultural income but profits of business and therefore not exempt.

Case stated under S. 2 (1), Act XI of 1922, by the Commissioner of Income-tax, Madras.

The petitioner is T. K. E. Ibrahimsa Ravuttar of Trichinopoly.

2. His chief source of income is business in money lending. He returned an income of Rs. 1,804 from this source.

3. He maintains no accounts for this business and the exact amount of his income therefrom cannot be determined. It has been estimated at Rs. 40, 000. This was an enhanced estimate made under S. 31 on appeal by the Assistant Commissioner. Copies of the original order of assessment passed by the Income-tax Officer, Trichinopoly, and of the Assistant Commissioner's order on the appeal are appended—Exs. A and B.

4. The petitioner makes a practice of lending money on the security of documents which purport to convey to him, in lieu of interest, the right to possession and enjoyment of agricultural land. Simultaneously, or nearly so, another document is executed in each case purporting to be a lease of the land by the mortgagee to the mortgagor subject to the payment in the guise of rent of sums equivalent to interest at a fixed rate on the money lent. The Income-tax Officer and Assistant Commissioner looked to the substance of these transactions and found that the income derived from them was really part of the profits and gains of the business carried on by the assessee and not income derived from land used for

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agricultural purposes. The form of usufructuary mortgage and lease-back while no doubt partly intended to protect the capital was found to have been adopted as a cloak to conceal the real source and character of the income in question. The amount of the income from such of these mortgages as were disclosed was found to be Rs. 6; 285.

5. The petitioner appealed to me under S. 32 against the enhancement and at the same time required me, under S. 66 (2), to refer certain questions for the opinion of the High Court. The appeal and the application for reference were dismissed. Copies of my orders are appended—Exs. C and D.

6. In the application under S. 66 (2) the first question propounded ran as follows:—

"When a mortgage of lands is with possession carrying higher stamp duty than a simple mortgage, can the Income-tax Officer go behind the registered instrument and institute an enquiry to see whether it is really a simple mortgage and assess the mortgagee for incometax calculating interest upon it as if it was a simple mortgage."

The petitioner's case then was that the Income-tax authorities were debarred by the form of the transactions from any enquiry into their substance. He disputed the right of the Income-tax Officer to "go behind the transaction" and look to its substance and its real character. He did not dispute the correctness of the finding that the sum in dispute was income from business. It was on this footing that the case was put before me by Dewan Bahadur O. Thanikachalam Chettiar, the petitioner's advocate.

7. The High Court on the application of the petitioner has now called upon me to refer the following question :—

"If an assessee takes a usufructuary mortgage from a mortgagor and leases it back again to that person receiving rent from him, is that rent assessable to Income-tax?"

8. I propose to assume that the mortgage contemplated in the question is a mortgage of land used for agricultural purposes and either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such, in the language of S. 2 (1) (*a*) of the Act. If the property mortgaged were a house, for instance, it is presumably beyond dispute that the rent received would be assessable either under S. 12 as "income from other sources" or under S. 9 as representing the whole or part of the annual rental value of the property.

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(9) The question thus formulated was not raised before me in the application under S. 66 (2) and I submit that the petitioner is not entitled to raise it now. I submit further that S. 45 of the Specific Relief Act, quoted in the order of the Court, cannot be invoked in this case since the remedy provided by S. 66 of the Income-tax Act was available to the petitioner.

10. I have refrained from troubling the Court with an application in this matter under R. 8 of the rules of procedure prescribed for these references, because the Court has ruled on a previous occasion that a preliminary objection of this character can be entertained at the hearing of the reference itself.

11. In view of the facts and circumstances found in paragraph 4 above, I am of opinion that the exemption of agricultural income under S. 4 (3) (8) of the Indian Income-tax Act which is designed to protect the income derived from agricultural land subject to payment of land revenue from double taxation cannot apply to income which in fact and in truth is part of the profits and gains of the money lending business carried on by the assessee. I am of opinion that the decision of this Court in *the case of Subramania Sastrigal* (Referred Case No. 18 of 1925 reported in Mr. P. R. Srinivasan's Reports of Income-tax Cases, Vol. II, Part III, p. 152) is applicable to this case, and that the question should be answered in the affirmative.

K. S. Krishnaswami Ayyangar for *A. Krishnaswami Ayyar, T. M. Venugopala Mudaliar* and *M. Balasubramania Mudaliar* for the Assessee.

M. Patanjali Sastri, Special Counsel for the Referring Officer.

The Court delivered the following.

Srinivasa Ayyangar J.

JUDGMENTS :—*Judgment of the Chief Justice, Wallace, J., Beasley, J.,* and *Srinivasa Ayyangar, J.,* was *delivered by Srinivasa Ayyangar, J.* :—The question referred in this case for the opinion of the High Court is as follows : "If an assessee takes a usufructuary mortgage from a mortgagor and leases it back again to that person receiving rent from him, is that rent assessable to income tax ?" When the case came on at first before three of us, on hearing arguments to some extent, it became clear that the decision and opinion of the three

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judges of this Court in Income-tax Referred Case No. 18 of 1925 required re-consideration and it was thereupon this case was directed to be posted for being heard before a bench of five judges. It is correct as pointed out by the Income-tax Commissioner in his letter of reference that the question proceeds on the assumption that the subject-matter of the mortgage is land used for agricultural purposes and either assessed to land revenue in British India or subject to a local rate assessed and collected by Officers of Government as such in the language of S. 2 (1) (a) of the Income-tax Act. We are now satisfied that the answer to the reference in the case above referred to was given without full discussion or consideration. S. 6 of Income-tax Act XI of 1922 is the charging section. Though in that section interest on securities, property, business and other sources of income are all indicated as heads of income chargeable with income-tax, still the section begins with the words "Save as otherwise provided by this Act". In Cl. 3 of S. 4 it is, however, provided that the Act shall not apply to certain classes of income and the sub-Cl. 8 thereof is "agricultural income'. It follows from this that the classes of the incomes specified in S. 6 are liable to the tax only subject to the exceptions set out in S. 4, Cl. 3 ; in other words, even though some income is capable of falling within one or more of the classes assessable to income-tax under S. 6, still if such income should also be agricultural income the same will be exempt from assessment. The expression 'agricultural income' is defined by S. 2, Cl. 1 as including any rent or revenue derived from land which is used for agricultural purposes. S. 2 which is the definition section in the Act, as usual in all enactments, sets out the definitions with the qualification "unless there is anything repugnant in the subject or context". It was argued by Mr. Patanajali Sastri for the Commissioner that as in S. 10 read with S. 6 the Act provides that the tax shall be payable by an assessee under the heading of 'Business', in respect of the profits or gains of such business, the exemption under sub-Cl. 8 of Cl. 3 of S. 4 of agricultural income, must, having regard to the context, be construed as referring only to such agricultural income as is not capable of being properly designated as income from business. There is no warrant for such a contention. The expression 'agricultural income' in S. 4 has no special context apart from all the classes of income exempted from assessment, and the expression

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'agricultural income' the definition of which is in question does not occur in any context in either S. 6 or S. 10. It is a well-established cannon of interpretation that any question of context or repugnancy in the subject can arise only if the same expression that is defined occurs or is repeated in any particular section. The only question is whether, having regard to the facts of this case, the rent accruing to the mortgagee from agricultural land is or is not liable to exemption as agricultural income. It has been assumed for the purposes of the reference that the lands are used for agricultural purposes and the income under reference is the amount agreed to be paid as rent by the mortgagor-lessee in respect of such lands. Having regard to the amount reserved as rent under the lease-deed there can be no question that it is rent derived from land which is used for agricultural purposes. There can be no question also in this case of the motives of the assessee in bringing about a particular arrangement, because as has been pointed out by the House of Lords in more than one case it is not proper to take such motives or objects into consideration, and a subject is entitled, if he can in any legal manner, to circumvent the incidents of a particular taxing or financing Act. According to S. 6, income from business is assessable only if it be not agricultural income, and to invert this and contend, as was argued in this case, that agricultural income will not be exempt from assessment if it be business income would lead to a complete deadlock. We must take it that the usufructuary mortgage referred to in the question is a simple or pure usufructuary mortgage and that there is no stipulation as to any interest and that the income accruing from the properties mortgaged is to be taken and enjoyed by the mortgagee with possession. No doubt as indicated in the question itself the land subject to the mortgage is leased back again by the mortgagee to the mortgagor and therefore even reading both the instrument of mortgage and the instrument of lease together as indicated by the Judicial Committee in *Abdullah Khan* v. *Bashart Husain* (1) it must appear that the amount sought to be assessed is legally only rent. If it be rent and in this case there is nothing to show that it is anything else, then on the considerations set

1. (1912) L. R. 40 I. A. 31 = I. L. R. 35 All. 48 = 25 M. L. J. 91 (P. C.)

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out already it follows that it is not assessable. Our answer therefore to the question referred is in the negative.

The assessee will have his costs, which we fix at Rs. 300.

Jackson, J. :—The question for decision is, shortly, whether a money lender who enters into a familiar form of transaction, a mortgage and lease back, is exempt from paying income-tax upon its proceeds. I could understand the assessee's claim if the transaction were strictly divided into two parts. First as usufructuary mortgagee he enters into possession of the property, and looks to its agricultural yield for his interest ; then he prefers to realize that yield by putting a tenant into possession and enjoying the rent. But this division into two parts was not held to be the correct method of interpretation by the Judicial Committee in *Abdullah Khan* v. *Bashart Husain* (1) where it ruled that the mortgage and lease were parts of one and the same transaction. Viewed as a whole the transaction is one by which the money lender obtains interest on the money advanced ; there was never any real transfer of possession, and the so-called rent has nothing to do with agricultural purposes, being entirely based upon the money lending firm's rate of interest. In my opinion it is not agricultural income but profits of business and therefore not exempt. A full bench of this Court held the same view in R. C. 18 of 1925 and I am not persuaded that that decision is wrong.

A. S. V. Reference answered in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATA ACHARIYAR.

S. Srinivasa Ayyar and another.. *Appellants** (*Defts.*)

v.

Lakshmi Ammal *alias* Yogambal Ammal and others .. *Respondents* (*Plaintiffs.*)

Srinivasa Ayyar v Lakshmi Ammal.

Hindu Law—Widow—Maintenance—Right to—Forfeiture of—Refusal to live with relatives of husband—Effect—Rate of maintenance—Elements to be considered in fixing—Survivors living frugal life—Forcing of such life on widow—Their right of—Arrears of maintenance—Widow's right to—Waiver or abandonment—Effect of—Evidence of—Personal decree against surviving co-parceners—Validity—Conditions—Past and future maintenance—Distinction—Civil Procedure Code, O. 33, Rr. 10 and 11—Court-fee—Defendant's liability for—Limit of, to plaintiff's success.

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* Appeals Nos. 236, 237 & 238 of 1925. 27th September, 1927.

1. (1912) L. R. 40 I. A. 31 = I. L. R. 35 All. 48 = 25 M. L. J. 91 (P. C.).

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A Hindu widow is not bound to reside with the relatives of her husband, and she is not disentitled to separate maintenance merely on the ground that she declined to accept their offer to maintain her in their home.

The right of a Hindu widow to maintenance out of the estate of her deceased husband in the hands of his heir or successor is in the nature of a burden upon the estate subject to which he takes the property. Her right is to be maintained in comfort having regard to the extent of the assets of her husband taken over by his successor. The standard of comfort must necessarily vary with the means of the family due regard being also paid to the wants of the other members of the family who also have to be maintained out of the income of the family properties. Each case must be decided on its own facts. As possession of the assets of her deceased husband is the source of obligation, it is also the chief element to be considered in fixing the widow's maintenance.

There is, however, no fixed ratio between the income derivable from the husband's share and the proportion thereof which should be awarded to her for her maintenance. It is not open to the surviving co-parceners of her deceased husband to prescribe any arbitrary standard as regards the comforts the widow is to have or the style in which she is to live. It is not open to them, if they choose to live a very frugal life, to force that style of living upon her.

Position of a widow in these matters contrasted with that of a wife.

Unless there has been any waiver or abandonment by a Hindu widow of her right to maintenance, she is entitled to maintenance from the date of the death of her husband. Such a waiver cannot necessarily be inferred either from the fact that no formal demand was made or from the circumstance that she is living in her parental home.

Though the obligation of the surviving co-parceners to maintain the widow of a deceased co-parcener springs only out of the possession of property, yet, if the income for any particular period has been already received by them and not duly accounted for by them, a personal decree may be passed against them in respect of such a period.

Personal decree as regards arrears of maintenance and the lump sum allowed for *Vrithams*, etc., upheld ; such decree set aside as regards future maintenance.

Under Rr. 10 & 11 of O. 33 of Civil Procedure Code, it is not open to the Court to direct the defendants to pay court-fees exceeding the amount which is payable on that portion of the plaintiff's claim which is successful.

Appeals against the decrees of the Court of the Additional Subordinate Judge of Tinnevelly in O.S. Nos. 2, 35 and 39 of 1924.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellants.

S. Panchapakesa Sastri for the Respondent in Appeal 236 of 1925, *the Advocate-General* (*T. R. Venkatarama Sastri*) and *C. A. Seshagiri Sastri* for the Respondent in Appeal 237 of 1925, and *K. V. Krishnaswami Aiyar* and *A. Rangaswami Aiyangar* for Respondent in Appeal 238 of 1925.

The Judgment of the Court was delivered by *Tiruvenkata Achariyar, J.* :—

JUDGMENT :—These Appeals are preferred by the same appellants against the decrees passed in three connected suits which were instituted against them by the respondent in each of the appeals. The three suits were tried together and disposed of by a common judgment by the Additional Subordinate Judge of Tinnevelly, as the questions involved therein were substantially the same, *viz.*, what provision the court should

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make for the maintenance of the plaintiff in each suit, as the widow of an undivided brother of the defendants, a question the decision of which rested on substantially the same facts in all the three cases.

The material facts of the case are as follows :—The appellants are the surviving sons of one Subbuswamy Ayyar who died in or about 1904 leaving considerable properties moveable and immoveable. They had two other brothers named Subramanya Ayyar and Ramachandra Ayyar ; all the four brothers formed a joint Hindu family who lived together and had a common mess. Ramachandra Ayyar died on the 1st July 1919 without leaving any issue. The plaintiff in O. S. No. 39 of 1924 is his widow Lakshmi, whom he had married in May 1915. Subramanya Ayyar died on the 28th February, 1922, without issue but leaving him surviving two widows, named Kamakshi and Lakshmi. Kamakshi was his first wife whom he had married in 1909. She lived with him for about five years from 1911 to 1916—after which she has been residing in her paternal home on account chiefly of the state of her health. She is the plaintiff in O. S. No. 35 of 1924. The second wife, Lakshmi, was married on the 3rd June, 1920. She lived in her husband's house for about six months in the latter part of 1921 and she returned to her paternal home about a month prior to her husband's death. At the date of the suit she was a minor but she has since come of age. She is the plaintiff in O. S. No. 2 of 1924.

All the three plaintiffs aforesaid sued the defendants *in forma pauperis* to enforce their right of maintenance against the joint family properties in the hands of the surviving male members of the family, *viz.*, the defendants 1 and 2. They say that the joint family of which their husbands were members owned considerable properties moveable and immoveable the annual income of which was about Rs. 50,000 and that they are entitled to separate maintenance with arrears from the respective dates of their husbands' death.

The widows of Subramanya Ayyar claimed maintenance at Rs. 250 a month for each with arrears at the same rate and also a lump sum of Rs. 3,000 each for performing the various *vrithams*, pilgrimages and sradhas which they as his widows should perform for the benefit of his soul. They also prayed that their maintenance should be made a charge upon

certain immoveable properties of the family. Lakshmi, the widow of Ramachandra Ayyar, claimed maintenance at a higher rate, *viz.*, at Rs. 300 a month with arrears at the same rate and also a lump sum of Rs. 5,000 for vrithamas, pilgrimages and sradhas which she, as a widow, ought to perform. She also prayed that the maintenance decreed to her should be made a charge on the immoveable properties specified by her.

The three suits were strenuously contested by the defendants whose chief pleas were :

(1) That the plaintiffs cannot claim separate maintenance as the defendants offered to maintain them suitably in their home and the plaintiffs were bound to accept the said offer, especially as such was also the wish of their deceased husbands.

(2) That having regard to the style of living of the defendants' family during the lifetime of Subramanaya Ayyar and Ramachandra Ayyar, the plaintiffs, as the widows of the said Subramanya Ayyar and Ramachandra Ayyar, are only entitled to be maintained in the same style and on that basis each of them will not be entitled to more than Rs. 20 a month and as they did not accept the defendants' offer to maintain them in their own home, they are not entitled to the arrears of maintenance claimed by them.

(3) That the amount claimed for performing vrithams, pilgrimages and sradhas is far too excessive, and not more than Rs. 750 should be decreed to them for those purposes.

The learned Subordinate Judge overruled the plea that the plaintiffs were not entitled to separate maintenance. He held, considering all the circumstances of the family, that a sum of Rs. 100 a month would be a fair provision for the maintenance of each of the plaintiffs, and he passed a decree accordingly with arrears at the same rate from the date of the husband's death. He allowed Rs. 100 a year each for clothing ; he also awarded a lump sum of Rs. 2,000 each for the performance of vrithams, pilgrimages and sradhas. He also directed that the maintenance awarded be charged upon the immoveable properties of the family specified in each decree. He further directed that the defendants should bear their costs and also pay to each plaintiff her costs of the suit. The learned Subordinate Judge finally directed that the defendants

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should pay to the Government the entire court-fee payable for all the three suits.

Against the said decrees the defendants have preferred these appeals in which their main objections relate to the rate of maintenance fixed by the lower court for each of the three plaintiffs and to the lump sum for the purpose of vrithams etc., which, the appellants say, are far too excessive. They object also to the direction in the decrees against them as to the costs and court-fees and they also contend that no personal decree should have been passed against them for the maintenance decreed to the plaintiffs.

The respondents also have put in memorandum of objections in which they claim that maintenance at a higher rate should have been awarded to them.

We shall now deal with the several contentions pressed before us on behalf of the appellants. The first point raised before us is that the plaintiffs are not entitled to separate maintenance, because the defendants were and are prepared to maintain them in their home and that was also the direction of their respective husbands which they are bound to conform to. These contentions form the subject of specific issues in all the three suits and they are also raised in the memorandum of appeals in as many as ten grounds. Exhibits I and II were relied upon in the lower court as containing the directions of Subramanya Ayyar and Ramachandra Ayyar to their respective wives that they should reside in the family house at Tinnevelly and be maintained by the family. The genuineness of these documents was impeached on behalf of the plaintiffs and a good deal of the judgment of the learned Subordinate Judge deals with that question. His finding is, that the defendants have not proved the genuineness of either Exhibit I or Exhibit II. The learned vakil for the appellants hardly attempted to overturn that finding though he referred to them in connection with this question and the question as to the proper rate of maintenance for the respective widows as to which also Exhibit I contained a direction, *viz.*,

that if the Defendants think it would be better that the widows should live apart from the family, each of them should be given not less than Rs. 15 a month for her expenses.

The learned Advocate General who appeared for the Respondent in one of the appeals argued that, though according to the plaintiffs' case Exhibits I and II were spurious docu-

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ments got up for the defence of these suits, yet he can rely on those documents as showing the attitude of the defendants with regard to the claim for maintenance put forward on behalf of the plaintiffs. Exhibits I and II not having been proved, the defendants' contention based on them must fail as held by the learned Subordinate Judge. The contention that the plaintiffs can claim separate maintenance only if the defendants are not willing to maintain them in their home is equally untenable. It is now far too late in the day to raise such a contention. On this point we need refer only to the pronouncement of their Lordshipts of the Privy Council in *Raja Pirthee Sing* v. *Rani Rajkooer* (1), a decision of 1873, which has been followed in all the subsequent cases on that point. At page 243 of the report their Lordships observe as follows :—

"A Hindu widow is not bound to reside with the relatives of her husband. The relatives of her husband have no right to compel her to live with them and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes."

On behalf of the respondents it is urged that all the plaintiffs are still young and their parental home is the more proper one for their residence than the defendants' family especially as the plaintiffs in O. S. Nos. 2 of 1924 and 39 of 1924 hardly lived with their husbands during their lifetime and the plaintiff in O. S. No. 35 of 1924 had ceased to live with her husband for about six years prior to his death apparently on account of the state of her health. We think these considerations are not without weight. In our opinion the plea that the plaintiffs are not entitled to separate maintenance was rightly overruled.

The next question we have to consider is whether the amount which has been awarded by the lower court to each of the widows for her maintenance is a reasonable amount having regard to all the circumstances of the family. The lower court has awarded maintenance at Rs. 100 a month to each of them besides Rs. 100 a year each for clothing and a lump sum of Rs. 2,000 for performing vrithams, pilgrimages and other special ceremonies which a Hindu widow is enjoined to perform.

(1) (1873) L. R. I. A. (Sup.) 203=12 B. L. R. 238 (P. C.).

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The defendants contend that the amount awarded is far too execessive and that each of the widows should not be awarded more than Rs. 20 a month for her maintenance besides provision for her residence. The parties are members of a middle class Brahmin family possessed of considerable ancestral properties, the income of which has been estimated by the Subordinate Judge at about Rs. 30,000 a year. The respondents attempted to make out that the annual income is much larger. The bulk of the income is derived from investments of the moneys of the family in loans carrying varying rates of interest. Such an income is no doubt subject to fluctuations, to say nothing of the risks involved in such transactions by reason of the security proving insufficient or the debtor in the case of unsecured loans becoming insolvent. For the purposes of this suit it is unnecessary to find out precisely the average annual income of the family and all that is required is a fair estimate of such income making due allowance, in the case of lands, to good and bad seasons and, in the case of moneys lent, to the risks attendant upon such transactions. We think, on the whole, that the estimate arrived at by the Subordinate Judge as to the average annual income of the family from it's properties is a fair one. It is with reference to the income of the joint family properties and the interest therein which Ramachandra Ayyar and Subramania Ayyar, respectively, possessed at the time of their death, the learned Subordinate Judge had fixed the monthly allowance for maintenance for the three widows. The contention before us on behalf of the appellants on this question is that the Subordinate Judge erred in this case in fixing the monthly allowance with reference chiefly to the income of thefamily. It is contended that though the family had large income they were content to live in a frugal and economical style and that the total expenses of the joint family, when all the four brothers were living, did not exceed in the average more than Rs. 2, 500 or say Rs. 3,000 a year. The widows of the deceased co-parceners cannot claim to live in a better style than their respective husbands and if it had cost the latter only Rs. 20 or Rs. 25 a month each for maintenance, their widows cannot in law claim more. It is this contention which was pressed strongly before us by the larned vakil for the Appellants. In our opinion it is based upon a misconception of the respective rights and duties of the wife and the widow. The position of

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the widow in law is substantially different from that of the wife. A Hindu wife after she attains puberty is according to law and custom bound to reside with her husband in conjugal life and he is also bound to live with her and is under a personal obligation to maintain her suitably quite irrespective of his having any properties, ancestral or self-acquired. A wife under normal circumstances has to share the comforts or discomforts of her conjugal life with her husband in whatever station of life he may be placed. If he is frugal and economical she must perforce be content to live as he does. If, on the other hand, he lives a life of comfort and luxury she shares that also with him. This is well exemplified in the life of the heroine of the great Hindu Epic 'Ramayana' who is considered by all Hindus as the ideal wife. So long as the wife is not treated with cruelty or denied the bare necessaries of life while she is living with her husband, she cannot complain. It need secarcely be added that under normal circumstances the wife while living with her husband has also a potent voice in determining their style of living. But in this case none of the plaintiffs have had that opportunity. If the husband forsakes his wife without any fault on her part, he is according to the texts of Hindu Law penalised by being obliged to give her a third of his property provided that would be sufficient for her maintenance. It will thus be seen that as between the husband and wife the mutual obligations are special and they result from circumstances that they are bound to live together and to attend to each other's comforts. But the position of the widow with reference to her husband's co-parceners or heirs is altogether different. She is not bound to reside with them, nor are they under any personal obligation to maintain her. Their liability to do so arises only if they have taken the assets of her deceased husband either by inheritance or by survivorship. As possession of the assets of her deceased husband is the source of obligation, it is also the chief element to be considered in fixing the widow's maintenance. If the husband had been a divided member of the family or had left self-acquisitions, she would inherit them as his heir and be entitled to enjoy the entire income of such properties. Where such income is not sufficient to meet her reasonable wants, she may even alienate the corpus of the estate. The rights of the widow of an undivied member whose interests in the joint

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property have passed by survivorship to the other male members of the family are thus stated in *Lingayya* v. *Kanakamma* (2).

"The wives of the male co-parceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husbands' shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their *lifetime sufficient to maintain them in comfort*, according to the means of the family (*Italics* our own). This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves "

The right of the widow to maintenance out of the estate of her deceased husband in the hands of his heir or successor is in the nature of a burden upon the estate subject to which he takes the property and her right is to be maintained in comfort having regard to the extent of the assets of her husband taken over by his successor. The standard of comfort must necessarily vary with the means of the family due regard being also paid to the wants of the other members of the family who also have to be maintained out of the income of the family properties. Each case has to be decided upon its facts. Where the assets of the husband which have been taken over are comparatively small, it has been held that the widow may be awarded even the whole of the income from her husband's share as it was at the time of his death. But in other cases there is no fixed ratio between the income derivable from the husband's share and the proportion thereof which should be awarded to her for her maintenance. All that is required is that the allowance ought to be such as to enable her to live in comfort having regard to the means of the family. Such being the rule, it is not in our opinion open to the co-parceners of her deceased husband who have taken his properties by survivorship to prescribe any arbitrary standard as regards the comforts the widow is entitled to have or the style in which she should live. It is not open to them to say "though we get a large income from the family properties we prefer to live as frugally as possible and we would go on saving the bulk of our income as the family has been doing heretofore and you should also be content with the barest necessaries of life". In our opinion this contention is entirely unwarranted. We do not think that the sages of the Hindu Law regard *the mere hoarding of wealth as a meritorious act*; especially in the

2. (1913) I. L. R. 38 Mad. 153 : 28 M. L. J. 260.

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case of Brahmanas. There is of course nothing to prevent the owner of the property for the time being from living as frugually as he chooses, but he has no right to force his style of living upon other persons who have independent rights in respect of the property. That is where the position of the widow differs from that of the wife. In case of dispute as to what is necessary for the widow to live in comfort, it is for the Court to decide what is reasonable having due regard to all the circumstances of the family and chiefly with reference to the interest which her husband had in the properties which have passed to his successor. We think therefore that the learned Subordinate Judge rightly overruled this contention and that he was right in fixing the monthly allowance which would be requisite for the widow to live in comfort, with reference to the income which her husband was entitled to for his share at the time of his death. The result of the decree is that out of the total annual income of Rs. 30,000 which the defendants are getting from the family properties he has awarded Rs. 3,900 only to the three widows of the two deceased brothers who both were entiled to a half-share in the income of the said properties. The defendants and the other members of the family are still left with an annual income of not less than Rs. 25,000 a year with which they can satisfy their wants and according to the defendants' own ideas of living they would be able to save not less than Rs. 20,000 a year for several years to come with the result that the corpus of the family also will swell up year after year and increase the annual income also proportionately. Several cases were cited at the bar to show what maintenance has been decreed to the widows in those cases with reference to the income of the family. We think it is unnecessary to refer to those cases as each case has to be decided upon its facts. We may however observe that the general principle underlying all those cases including the case in *Pushpavalli Thoyarammal* v. *Raghaviah Chetty* (3), which was relied on by the learned vakil for the appellants as the one most in point so far as the present case is concerned, is that the allowance decreed to the widow should be such as to enable her to live in such comfort as she may be reasonably entitled to, having regard to the means of the family and the claims of the other members thereof. The rate of main-

3. (1913) 15 M. L. T. 95.

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tenance allowed to each widow in this case cannot be considered to be excessive in comparison with the amount (Rs. 140 a month) allowed to the widow in *Pushpavalli Thoyarammal* v. *Raghaviah Chetty* (3), relied on by the appellants. The learned Subordinate Judge who is a member of the same community to which the parties belong has gone into the question carefully and has fixed the monthly allowance at Rs. 100 for each widow having regard to all the considerations which ought to weigh in such a case and we see no reason whatever to interfere with the exercise of his discretion.

The respondents in their memorandum of objections have claimed a higher rate of maintenance. It follows from what we have stated that their claim for enhancement of the monthly maintenance should also be disallowed.

On behalf of the widow of Ramachandra Ayyar in O. S. No. 39 of 1924 it is urged that she as a single widow of Ramachandra Ayyar is entitled to claim maintenance at a higher rate than the joint widows of Subramania Ayyar. In our opinion this contention is also untenable. No widow whether single or joint is entitled to claim any specific share of the income which is attributable to her husband's share and all that she is entitled to is an allowance sufficient for her comfort and on this principle there is no reason to differentiate between the three plaintiffs in this case.

The appellants next object to the award of a lump sum of Rs. 2,000 to each of the plaintiffs for performing vrithams, pilgrimages and other ceremonies. The objection is twofold, *viz.*, (1) that more than Rs. 750 should not be awarded and (2) that the amount required for each vritham or ceremony should be made payable only when such vritham or ceremony is about to be preformed and that the direction ordering a consolidated amount to be paid immediately for all of them is unwarranted. We observe that the only objection raised by the appellants in the lower court with regard to this item is that the amount claimed was excessive. The further objection is raised for the first time before us in these appeals. As regards the amount awarded we see no reason to differ from the learned Subordinate Judge, who has given sufficient reasons in paragraph 67 of his judgment. As regards the

3. (1913) 15 M. L. T. 95.

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objection now raised before us it would appear that of the several vrithams and ceremonies which the widow is enjoined by the Shastras to perform, only one has to be performed by her at a comparatively late stage in her life but all the other ceremonies may be performed at any time she likes. The objection which after all applies only to one of the ceremonies does not seem to us to be so material that we should now entertain it for the first time and especially as the amount which may have to be allocated for it will at the most be a few hundred rupees, and therefore the order of the lower court for the vrithams and ceremonies will stand.

The next objection relates to arrears of maintenance. The lower court has awarded to each of the widows arrears of maintenance from the date of the death of their respective husbands and at the same rate as fixed for their future maintenance. The objections raised by the appellants are : (1) that arrears of maintenance should not have been awarded for any period prior to the actual demand made by or on behalf of the widows for maintenance ; and (2) that as regards past maintenance the rate should have been lower than that fixed for future maintenance. A further objection is also raised (3) with regard to the minor plaintiff that she cannot claim any arrears of maintenance for the period of her minority.

As regards the first objection the authorities are clear that unless there was any waiver or abandonment of her right to maintenance by the widow, she is entitled to maintenance from the death of her husband, the obvious reason being that the property of the husband which devolves on his heir or survivor descends subject to the burden of her maintenance. Such a waiver cannot necessarily be inferred either from the fact that no formal demand was made or from the circumstance that she is living in her parental home. See *Pushpavalli Thoyarammal* v. *Raghaviah Chetty* (3), following *Rangathayi Ammal* v. *Munusawmi Chetty* (4), and *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu* (5).

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3. (1913) 15 M. L. T. 95, at p. 97.

4. (1911) 21 M. L. J. 706.

5. (1900) L. R. 27 I. A. 151 : I. L. R. 24 Mad. 147 ; 10 M. L. J. 294 (P. C.).

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As regards the second objection we see no reason for interfering with the discretion of the lower court as regards the rate fixed for the arrears of maintenance due to each plaintiff.

The third objection which relates to the minor plaintiff (Lakshmi, 2nd wife of Subramania Ayyar) also seems to us to be equally baseless and was rightly overruled by the lower court.

The next objection to the decree relates to the question of costs. It is urged on behalf of the appellants that as the claims of the serveral plaintiffs were considerably exaggerated and the lower court decreed to them less than half of what they claimed, the proper order as to costs should have been to direct the parties to pay and receive proportionate costs. The learned Snbordinate Judge in the concluding paragraph of his judgment says that as the defendants withheld all the information from the plaintiffs as to the resources of the family the plaintiffs were not in a position to know what the income of the family was and that therefore they cannot be blamed if they proceeded upon an exaggerated view of the income of the family. We observe also that the defendants put forward in the lower court some pleas as to the maintainablility of the suits which were found to be quite vexatious and which the appellants' learned vakil in the exercise of a wise discretion refrained from pressing before us. A good deal of the enquiry beforc the lower court related to the genuineness of Exhibits I and II which were put forward by the defendants to defeat the plaintiffs' claim to separate maintenance and also to reduce the rate of maintenance to an amount alleged to have been fixed by their husbands. The learned Subordinate Judge after an elaborate enquiry held that Exhibits I and II were not proved to be genuine. That question also, wisely as we think, was not re-opened before us by the appellants' learned vakil. In our opinion the direction that the defendants should not only bear their own costs but pay the plaintiffs' costs also of the suit was in the circumstances of this case a proper one.

The next objection relates to the direction as to court-fees. The learned Subordinate Judge has directed that the entire court-fees payable by the plaintiffs to the Government in all the three suits should be borne by the defendants. The appellants contend that this direction is wrong and under

Order XXXIII, Rules 10 and 11, Civil Procedure Code, it is not open to the Court to direct the defendants to pay court-fees exceeding the amount which is payable on that portion of the plaintiff's claim which is successful. We think that this contention which is supported by *Ganga Dahal Rai* v. *Mussammat Gaura* (6), following *Chandrareka* v. *Secretary of State for India* (7), should be allowed and that the decree of the lower court in each case should be modified by directing the defendants to pay court-fees only on the amount decreed to the plaintiffs and directing the plaintiff in each case to pay the difference between that amount and the entire court-fee payable by her for each plaint. Any excess paid by the defendants will be set off as against the amounts decreed to the respective plaintiffs.

The next and the last objection which has been urged by the appellants against the lower court's decree is that no personal decree should have been passed against the defendants in any of these cases. The contention is that the defendants are under no personal obligation to maintain the plaintiffs and that, as their obligation springs only from their possession of the property of the family, the decree against them should be only for payment out of the assets of the family. We find that even in such cases there are precedents both ways, which is probably due to the fact that in many cases the defendants themselves do not object to a personal decree. We find also that the plaintiffs in O. S. Nos. 2 and 39 of 1924 do not in their plaint ask for any personal decree as regards future maintenance. Though the obligation springs only out of the possession of property, yet if the income for any particular period has been already received by the defendants and not duly accounted for by them, there can be no serious objection to any personal decree being passed in respect of such a period. We are therefore of opinion that the direction in the decree making the defendants personally liable should stand as regards the arrears of maintenance, decreed to the plaintiffs, and the lump sums awarded to each of the plaintiffs for the performance of vrithams etc. and also, as to plaintiffs' costs of the suit, but, as regards future maintenance, which has been decreed, the direction in the decree making the defendants personally liable therefor will be amended as follows :

6. (1916) I. L. R. 38 All. 469. 7. (1890) I. L. R. 14 Mad. 163.

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—In Para 2 after the word 'defendant' insert the words "out of the assets of the joint family" and to para 5 add the words "except as regards their liability under paragraph 2".

As regards the memorandum of objections put in on behalf of the respondents, we have already dealt with the grounds relating to enhancement of the monthly maintenance. The other point which remains to be considered is that which was pressed on behalf of the respondent Lakshmi, the junior widow of Subramanya Ayyar, *viz.*, that the payment of the maintenance should be charged also upon the houses situate in the town of Tinnevelly and other properties. We see no sufficient reason for acceding to this contention. If hereafter it turns out that the properties charged under the decree with the payment of the maintenance to the respective widows do not offer adequate security, it will be open to the respondents to apply to the Court which passed the decree to take into consideration the altered circumstances and modify the decree suitably.

Another point raised on behalf of the same plaintiff is that the Judge has omitted to provide for the expenses of the annual shradha of her husband. We do not think so. We think this item is included in the provision made for her future maintenance at Rs. 1, 200 a year. It has also been so understood by the plaintiffs in the other two suits.

In the result the decrees of the lower court will be modified in two respects, *viz.*, (1) as regards the payment of court-fees to the Government and (2) the expunging of the direction as to the personal liability of the defendants, as pointed out above. Subject to such modifications all the appeals are dismissed with costs.

The memoranda of objections are also dismissed with costs.

A. S. V. *Decrees modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH, LORD DARLING AND LORD WARRINGTON OF CLYFFE.

Bhogilal Bhikachand and others .. *Appellants** (*Plaintiffs.*)

v.

The Royal Insurance Company, Limited .. *Respondents* (*Defts.*)

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Indian Evidence Act, 1872, *Ss.* 153, 155, 157—*Interpretation of—Effect of improper reception of evidence.*

Ss. 153 and 155 of the Indian Evidence Act, 1872, must be strictly construed and narrowly interpreted if the Courts governed by that statute are to be spared the task in many suits of prosecuting, on most imperfect material, issues, which have no bearing upon that really in contest between the parties.

Semble :—S. 153 of the Evidence Act is in accordance with the opinions of the Judges in the case of *Attorney-General* v. *Hitchcock*, (1847) 1 Ex. 91 = 154 E. R. 38.

Where, in order to corroborate a witness, a letter written by him was tendered and received in evidence under S. 157 of the Evidence Act, the Judicial Committee, in holding that, under the circumstances, the letter was not properly receivable for any purpose, made the following pertinent observations :—"Its contents ought to have been excluded from judicial consideration in all Courts as completely as they have been ignored by their Lordships".

Appeal (No. 103 of 1926) from a judgment and decree of the High Court, Rangoon (Robinson, C. J., and Brown, J.), dated the 15th June, 1925, reversing a decree of that Court in its Original Jurisdiction (May Oung, J.), dated the 24th June, 1924.

The appellants claimed Rs. 1,76,000 from the Royal Insurance Company, Limited, as being the value of a parcel of diamonds insured by the company in 1922 and lost in the course of transmission by registered and insured post from Rangoon to Bassein. The company alleged that the parcel either never contained diamonds of the value of Rs. 1,76,000 or that the diamonds and parcel were abstracted from the custody of the postal authorities with the knowledge and connivance of the senders. After a trial lasting eleven days Mr. Justice May Oung gave judgment for the appellants for the full amount claimed, with interest and costs. On appeal the High Court at Rangoon reversed that decision and dismissed

* P. C. Appeal No. 103 of 1926. 16th December, 1927.

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the appellants' suit, with costs. The present appeal to His Majesty in Council was then instituted.

Dune, K. C., and *Raikes* for appellants.

Neilson, K. C., and *McDonnell* for respondents.

Their Lordships' judgment was delivered by

LORD BLANESBURGH :—In this suit the appellants seek to recover from the respondents as insurers the sum of Rs. 1,76,000 with interest, the value of a parcel of diamonds alleged to have been lost or stolen in October, 1922, during its insured transit by registered post from Rangoon to the shop at Bassein of the second appellant, to whom the parcel was there addressed. The suit was brought in the High Court of Judicature at Rangoon. It was decreed by May Oung, J. On appeal, Robinson, C.J., and Brown, J., exercising the Appellate Jurisdiction of the Court, recalled the decree of the Trial Judge, and on the 24th June, 1924, dismissed the suit with costs. From this dismissal the plaintiffs now appeal, and they ask that the decree of May Oung, J., in their favour be restored.

The diamonds were insured partly under one policy, partly under another. Both policies, in terms identical, were in the name of the first appellant, but the diamonds were the property in part of the second and in part of the third appellant. The policies are in form policies of marine insurance covering goods transmitted from, *inter alia*, places in Burma to places in Burma "in the ship or vessel called the registered post." They insure against theft or robbery or loss any parcel of jewels duly declared from the time of the issue of the postal registered receipt until that of the delivery of the parcel to the consignee and his signature to the Post office. The delivery contemplated by the policies is delivery at the address of the consignee. The policy moneys are to be paid without abatement on the expiration of one month after first proper notice and proof of the loss have been given.

The first appellant is a commission agent at Rangoon. The second and third appellants, nephew and uncle to each other, are jewellers at Bassein, owners of separate businesses there. They are each of them customers of the first appellant. The commercial history of all three is good. At the time of the trial the first appellant had been in business at Rangoon

for over 30 years, and for six or seven years he had done his insurances with the respondents. His credit, so the respondents' principal witness stated in evidence, was unlimited. The other two appellants are younger men, but their businesses are said to be amongst the most important of their kind at Bassein. The third appellant holds a public position of some prominence in that town. The appellants were possessed of admirable insurance records. They had for all their years in business been insuring their jewels in transit and never before had any claim for a loss been made by any of them. In the present case all three appellants are alleged to be parties to a fraudulent insurance conspiracy. The charge has been launched by the respondents in circumstances to which reference must later be made. The appellants in facing it are entitled to have this record of theirs remembered.

But the first appellant is entitled to have something more said about him. At the time of the transaction originating at Rangoon and alleged by the respondents to have been a gross fraud upon them, the first appellant was on his way to India. He had left Rangoon a week before and he remained absent from Burma for many months. If there is anything clear in the case, it is that he personally had neither lot nor part in the transaction, be it fraudulent or innocent. It is not the least serious of the criticisms to which the judgment of the Appellate Court is open that the learned Judges there include in their insinuation, it is not a finding, of fraud all the three appellants indifferently—a mistake which is not surprising if they had regard to the terms of the respondents' notice of appeal. It was only before the Board that any personal imputation upon the first appellant was disclaimed by counsel for the respondents. This amende, tardy though it be, the first appellant is entitled to have put upon record.

The further facts of the case, as they emerge from the evidence and documeuts, are simple enough. On the 24th September, 1922, the second and third appellants accompanied by one Mehta, an associate in business of the third appellant, left Bassein for Rangoon. They came primarily to purchase diamonds for their Bassein businesses in anticiption of the up-country demand for these stones, always, it seems, most active during the months of October and November. Their purchases, or a great part of them, were to be made through

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the first appellant. His office accordingly became their business headquarters during their stay at Rangoon. It was at the time in charge of his managing clerk, one Pandya.

The second and third appellants did not make immediate payment for the diamonds which they purchased. The sums involved were beyond their cash resources. They either gave hundis to or were debited in account by the sellers for the agreed prices. Much of this indebtedness in respect of the lost jewels at the date of the trial still remained undischarged. In respect of some of it judgments had been recovered against the second and third appellants, and proceedings in bankruptcy threatened.

By Saturday, the 30th September, these appellants had, ready for transmission to Bassein, purchased and other jewels of the value of Rs. 1,60,000. On that morning the jewels were put up in separate packets to mark, *inter alia*, their different ownerships, and at the premises of the first appellant were enclosed in a metal cigarette case, which was then duly sealed in the presence of Pandya, of the second and third appellants, and of Mehta. The general direction seems to have been taken by Pandya. It was he who addressed the case to the third appellant at his shop at Bassein. It was he who suggested and marked upon the case the figure of Rs. 200 as a suitable insurance with the Post Office.

Of this Post office insurance, which ultimately played so important a part in the case, some explanation is here necessary. There was no obligation imposed by the policies to effect such an insurance in any amount. In the case of inland parcels of jewels, however, it seems to be usual, in Burma, for an assured, even if not so obliged by his policy, to insure them also with the Post Office in some amount usually nominal. Here Rs. 200 was the amount chosen, and Pandya chose it.

So marked and addressed, the parcel was taken to the Rangoon Post Office by Mehta and was there registered by him and, as had been suggested by Pandya, was insured also for Rs. 200. The Post Office receipts were in course despatched to the Rangoon Office of the respondents in order that, under the open policies of the first appellant then current, the insurance of the parcel at its full declared value might be duly effected. Saturday being a short day, the risk could not be

dealt with by the respondents until the following Monday morning. It was then promptly accepted.

Their Lordships have detailed these facts although this is not the insurance which in this suit is called in question. Upon this first insurance the respondents have received and retained their premium. The risk never became a claim. And they are now content. But this insurance was made at and before the trial a subject of elaborate inquiry at their hand; they desired to show that it was as fraudulent as the insurance immediately in question was being alleged to be, and, naturally, because so far as concerned the packing, posting, registration and insurance of the parcel, the facts deposed with regard to it were in substance identical with those sworn to in relation to the insurance in suit. It is not surprising, therefore, that the respondents did not accept them. But their attack failed. The facts, as above set forth, remained in the rusult uncontroverted, and this suggests another observation with reference to this first insurance. The second and third appellants had apparently no doubts as to its regularity, post office insurance and all. They risked their jewels in that confidence, which was not misplaced. The risk, as has been seen, was accepted by the respondents on the morning of the 2nd October without comment, inquiry or hesitation.

In the afternoon the second and third appellants were returning to Bassein. They had collected and had still with them diamonds valued at Rs. 1,76,000, a considerable portion of which had been purchased on the two preceding days. For safety's sake, and both Courts agree that this explanation was adequate, they were desirous that the jewels should go separately from themselves and should be insured with the respondents, as the first packet had been. Accordingly, a parcel containing the jewels was, on that morning, made up at the office of the first appellant exactly as had been the other, by and in the presence of the same persons. This parcel was taken to the Post Office, but this time by the second appellant and Mehta, addressed to the second appellantat at his Bassein shop. Like the first, and again at the suggestion of Pandya, the parcel was insured with the Post Office for Rs. 200 and so insured and registered was, the second appellant and Mehta deposed, despatched by them as had been the first. The Post Office receipts were, as before, sent on to the respondents and

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they at once accepted the risk for the full declared value of Rs. 1,76,000.

In both cases the respondents entered in the endorsements made by themselves on the policies the amount of the Post Office insurance, and not in the second case any more than in the first was objection taken or question raised either as to the amount of that insurance or at all. The parcel so registered and postally insured, now described as postal packet 217, duly reached Bassein on the evening of the 3rd October. It was put in the safe at the Post Office. On the same evening the second and third appellants returned from Rangoon. Early next morning the second appellant sent a messenger to the Post Office to take window-delivery of the registered parcel. He was told that it had already been handed to the postman, one Lala by name, for delivery on his round. An hour or so later, Lala returned to the Post office and reported to the Postmaster that the parcel had fallen through some broken meshes in his bag and had been lost. No trace of it has since been forthcoming, and its insured value is the claim which the appellants make against the respondents in this suit.

The claim was at once put forward. The first attitude of the respondents towards it was one of reserve. The sum claimed was large. It exceeded in amount any previous single insurance of the first appellant. The second and third appellants were nearly related. The two insurances, each so considerable and effected in such rapid succession, although exciting no observation when tendered for acceptance, seemed ominous in retrospect after one of them had matured into a claim. The respondents accordingly, as they were well entitlled to do, required strict proof of the loss. They demanded full particulars of the jewels contained in the insured parcel, indeed in both of the insured parcels. They pressed for information as to the place where and the persons in whose presence each of them had been packed. Noticing that the sum of Rs. 200 was less than the amount for which the first appellant had been accustomed to insure with the Post Office previous parcels of less value, they were insistent to know the reason why that smaller sum had been chosen in these instances. The particulars and information asked for were promptly, and, as has been found by the Trial Judge, accurately supplied. As to the Post Office Insurance for Rs. 200,

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the answer of the solicitors in a letter of the 23rd November, 1922, was that there was no special reason for insuring the parcel for that sum, instead of a larger amount, except a spirit of economy, and that it did not matter for what amount the parcel was insured in the Post Office as the assured were not looking to the Post Office to recoup their loss. The solicitors also pointed out, what was of course true, that the respondents had without objection endorsed the policies, well knowing in both cases that the parcels were covered by a postal insurance of only Rs. 200. To these statements no reply has ever been made, and to the letter itself the only response was to the effect that the claim papers were being forwarded to the respondents' Calcutta office for instructions, and that a further letter would be sent on recipt of the reply.

In the meantime the Post Office had called in the police to inquire into the loss of the parcel, and into the conduct of the postmaster and of the postman Lala in reference thereto. There were suspicious circumstances in relation to the condition of the postman's bag, and other matters. As a result, on the 15th February, the appellants were informed by the police that the case had been closed as undetected, and that guilt could not be brought home to Lala. The Post Office accordingly paid to the appellants their insurance of Rs. 200, and it may here be added that the postmaster was soon after promoted, while Lala at the time of the trial still remained in the postal service.

Of all this the respondents duly became aware, but they maintained their refusal to pay, adducing one reason after another in justification. The claim had been referred to the head office for final instructions. The police investigation into the alleged loss was not complete, and therefore the matter could not be disposed of then. This was on the 20th February. When informed on the 10th March by the appellants' solicitors that the police investigation had been closed, and that the Post Office had paid their insurance, the respondents' only reply was that the case was still under investigation by the Criminal Investigation Department, and that the Rangoon office was not yet in a position to make a disposal of the claim. That office having, apparently, in the meantime, made an unsuccessful attempt to induce the appellants to accept a smaller sum in satisfaction, this suit was, on the

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12th April, 1923, commenced, and therein on the 11th June, more than eight months after the loss, the respondents, for the first time, charged the appellants with fraud. This they did in the following paragraph of their written statement:—

"The defendants allege that the parcel in question in the alternative either never contained diamonds of the value of Rs. 1,76,000, or that the said diamonds and parcel was abstratced from the custody of the postal authorities with the knowledge and connivance of the plaintiffs, who have conspired to put forward a fraudulent claim in this matter."

The appellants complain, and with reason, that this most serious charge should have been so belated, and when made should be so vague. The first appellant, an old customer of the respondents, has a special complaint of his own, that without the slightest justification the charge should have been made to extend to himself, and is only now withdrawn. The explanation of the respondents' attitude in the matter is, as it happens, disclosed in a letter of the 10th February, 1923, addressed by their office at Calcutta to their Secretary at Rangoon:—

"I am obliged for your letter of the 5th instant, and note that, as the Criminal Investigation Department have so far failed to establish a case against the parties, the case has been filed as being "Undetected," but I assume that this does not mean that the Criminal Investigation Department intend to let the matter drop. I *trust* the former Bassein Post Master, who you advised us on the 17th October last had been transferred to Rangoon, will be closely watched, and that the Police will make every endeavour to identify the writer of the last anonymous letter which we recently sent you, and that they will continue to take an active interest in the case.

"I note the Post Office contemplate meeting the claim on them this week, but, whether they do so or not, I do not consider that we should yet make payment.

"The circumstances strongly point to attempted fraud, and, if further pressed, I think we should state that, in view of information which has reached us, we are not prepared to pay the claim. The less we say at this juncture the better, and I would not suggest indicating in any way what the nature of the information in our possession is. I must admit our information is very meagre, but the claimants need not know this. I doubt if a suit will be filed, but, if it is, fresh publicity will be given to the matter, which might lead to useful information being produced. While I am naturally very averse to delay in payment of claims, the circumstances in this case seem to warrant every means being taken to defer payment. Should a suit be filed, it will probably be several months before it is heard, and, in the meantime, incriminating evidence may be forthcoming, or we might be approached with a view to effecting a compromise."

The meagre information of February had not been supplemented in June. The only evidence of fraud forthcoming even at the trial had been colleeted by one, Bhattacharjee, to whom reference will later be made, long after the date of the written

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statement. The respondents accordingly remain under the imputation that when, so long after the event, they did put forward this charge of fraud, they had even then in their possession no evidence at all to support it. It was, in truth, a dilatory plea, not justified by their obligation under their policies to make prompt payment. The correspondence shows that this dubious procedure was not directed from London. The view of the respondents' head office, as early as the 10th January, had been that the claim should be met, provided that the police had finished their investigation, that no further information had been obtained, and that the Post Office had paid their insurance. That view was not, however, accepted at Calcutta, and this suit will not have been without some good effect if, as a result, the respondents see to it that similar wholesome instructions when given to their representatives in the East are in future observed.

The contest at the trial centred on the allegations in the respondents' written statement, and the issue of this appeal has depended upon the question whether either of their allegations in that statement is true. The first of them—that the parcel never contained diamonds of the stated value—put the appellants to proof of the fact that it did: the burden of the alternative allegation of fraudulent conspiracy remained heavily with the respondents.

Upon the first allegation the respondents' case really was, that there never had been any parcel containing diamonds made up anywhere. This was apparently the statement of the anonymous letters referred to by the Calcutta office in the above letter of the 10th February, 1923. It was accordingly not suggested to the witnesses that the postal packet 217 was other than the parcel packed at the office of the first appellant. What the respondents did try to prove was that in that parcel there never had been any diamonds at all—if for no other reason than this, that the appellants had not the diamonds to put into it. This was the contest, and in the course of it, evidence of the utmost particularity was adduced by the appellants and tested at every point by the respondents. The merchants from whom the jewels had been bought produced their account books: the persons present when the parcel was made up explained in detail what then happened.

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In the result the learned Judge in his judgment expressed himself very clearly. On the first point he thus stated his conclusions:—

"That the plaintiffs on or about the 2nd October, 1922, were in possession of diamonds of the description and value alleged by them is amply proved. They have called witnesses who made the sales, and their account books have been put in the translation of these account book entries and connected exhibits have taken much time, and I have spent many hours in checking the witnesses' statements."

As to the packing of the parcel the learned Judge also held that the account of it as above stated should be accepted. And all this was the view of the Appellate Court as well. There the appellants' possession of diamonds was no longer even contested by the respondents, and as to the making up of the parcel the learned Judges say,

"We see no reason to doubt that a parcel was made up containing them."

On these findings it might have been supposed that, subject to the result of the alternative issue of fraudulent conspiracy, the respondents' case was at an end. Registration, posting and insurance of the parcel so made up had been duly deposed to, and the evidence on the point had not been challenged either in cross-examination or by counter-evidence.

But this was not to be, for in his address to the Judge on the whole case counsel for the respondents essayed the contention that it had not been satisfactorily proved that the postal packet 217 was the same packet as that made up at the premises of the first appellant; that there was only the evidence of the second appellant and of Mehta that it was the same; that, for reasons to be alluded to later, Mehta's evidence must be ignored; and that the evidence of the second appellant, interested and uncorroborated as it was, should not be accepted as sufficient on so serious an issue.

Now, in their Lordships' view, this contention ought not, at the stage of the trial at which it was made, to have been entertained at all. The evidence with regard to the posting of the parcel had passed quite unchallenged; the respondents' sole case had been that there was only one packet and that it never contained diamonds; there was not a tittle of evidence to support the suggestion, made as a last resort, that there had been two. The learned Judge, however, did not take this strict view. He did not reject the contention as then inadmissible; he dealt with it on its merits. He found that the evidence of the second appellant with regard to the posting

could not be rejected, and being of opinion that the respondents' alternative case of fraud had not been made good, he decreed the suit.

In the Appellate Court this last contention of the respondents was put by them in the forefront of their case, and the treatment of it by the learned Judges there was somewhat unusual. Agreeing so far with the learned Trial Judge, they would not and did not hold judicially that fraud on the part of the appellants had been proved, but they intimated very clearly their belief that all three of them were implicated in something of the kind. They made no discrimination between the appellants on this head. They criticised the Trial Judge for adjudicating upon this last contention of the respondents without taking the appellants' unproved fraud into account. Allowing themselves to be duly influenced thereby, and taking the view also that the second appellant on another relevant matter was a perjured witness they refused to accept his evidence as to the posting, although it had been unchallenged, and they dismissed the suit with costs. This is the situation with which the Board have had on this appeal to deal.

Now, it was upon the view they took of the Post Office insurances that the decision of the learned Appellate Judges in its last analysis depended; and, indeed, these insurances have been invested by both Courts in Burma with a degree of decisive importance to which on the evidence their Lordships cannot help thinking they are in no way entitled. So much will, they believe, appear when their true purpose and proper implications have been ascertained, and that, in the first instance at all events, apart from any question of fraud. To this task, therefore, their Lordships at once address themselves.

In the present case the assured, as has already been pointed out, were not required by their policies to effect any Post Office insurances at all. It was enough that the jewels to be protected were being carried "in the ship or vessel called the registered post." Nor apparently were the respondents' policies singular in this respect. The jewel insurances of the second and third appellants had usually been effected with the Norwich Union Office, and specimens of that company's policies issued to them are in evidence. It thereby appears that

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the Norwich Union, presumably by way of protection against the temptation presented by over-insurance, required a declaration from its assured that his Post Office insurance did not exceed Rs. 50. In other words, under Norwich Union policies there was not only no obligation on the part of the assured to insure with the Post Office : there was an express limitation on his liberty so to do.

The practice among assured already referred to must, of course, be well known to the offices. They know that it is usual for an assured not only to register his jewels with the Post Office, as he is always bound to do, but also to insure them in some nominal amount with the Post Office whether so bound or not, and the practice seems to be rational enough. An honest assured prefers his jewels to their insurable value, and Post Office insurance is not unlikely to provide additional security in the transit of a parcel of jewels if in amount it be at once large enough to impress upon the officials handing it the propriety of taking special care of the parcel, but be not so large as to be likely to excite their cupidity or weaken their integrity. And if such be their purpose one would expect that the amounts of these insurances will be governed by no exact principles, but will depend upon the character or mood, or even caprice, of the individual assured when fixing them.

And this is just what all the witnesses, who deal with the subject in evidence, affirm. Pandya, who fixed the insurances here, is very clear on the point; and he is supported by appellants' witnesses numbered 2, 4 and 5, the first two, diamond merchants and the third, a jeweller at Rangoon, and by their witness numbered 8—a Rangoon dealer in precious stones in a large way of business. Pandya's statement is rejected by the learned Appellate Judges almost with derision. It may be doubted whether they could thus lightly have dismissed it had they considered it on its merits, had they reflected that it was so influentially confirmed in other quarters, and had they noted the failure on the part of the respondents to meet it by any evidence to the contrary, either of their own officials or from the trade.

In the result it appears to their Lordships that, apart from the Post Office regulation, so much discussed in Burma, and to which attention must now be directed, the insurance of the two parcels here for Rs. 200 each was most ordinary and

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natural. How far, then, is that conclusion affected by the existence of the regulation referred to ?

This regulation in effect is that at the local Post Offices throughout India and Burma, but only at these offices (for the regulation does not apply to large towns, as, for example, Calcutta or Rangoon), parcels insured for Rs. 250 or over are given window-delivery only ; they must be called for by or on behalf of the recipient; they are not delivered in the ordinary way to him at his place of address.

Now, with reference to that regulation, it must first be observed that it seems clearly to be one for the limitation of the Post Office's liability as insurers : it is not a regulation designed, as the learned Appellate Judges apparently thought, for the greater safety of the insured parcels, so that an assured who ignored it was, almost thereby confessedly, exposing his jewels to hazard. On the contrary, it would not seem to be natural that an insured person whose jewels were, as here, protected under his policy until delivered at his place of address, should effect when under no obligation to do so a Post Office insurance which would leave them at his charge between the Post Office and his place of business.

But the most striking thing in connection with this regulation is that to so many of the witnesses its existence was either unknown or discounted. This was the position of Pandya and at least three of the appellants' witnesses, all of them apparently quite independent. In this position, too, must have been the respondents themselves, for they attempted no explanation of how it was that the appellants' two parcels, each addressed to Bassein and each insured for Rs. 200, so that window-delivery was thereby excluded, were accepted without demur or delay. Their Lordships cannot doubt that the reason of all this was that the regulation was only locally operative—not operative, for example, in Rangoon, the centre of the Burmese jewel trade, and that the Insurance Companies, if they knew of it, attached to it, as was specially shown by the form of Norwich Union policies, no importance or value at all. The important fact that the regulation is not universally applicable was clearly not present to the minds of the learned Appellate Judges in considering its significance, for in the elaborate analysis of the previous insurances effected by the first appellant with the respondent, which they

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made in order to support their view that in the case of valuable parcels, insurances in excess of Rs. 300 had always been effected by him with the Post Office, they treat this excess as being equally pertinent in cases where the place of destination had been Calcutta or Rangoon, where the regulation does not apply, as in cases where the destination had been Bassein or some other place, where it is operative. Incidentally, also, they omit to observe that there is no instance of an insurance at Rs. 250 ; the insurance invariably is for some sum above or below that figure—a strange circumstance if the determining factor in fixing the amount was window-delivery or not. On this whole matter their Lordships come to the conclusion that this regulation in no way militates against their view reached apart from it, that the postal insurances here were not abnormal, and that the statement of Pandya that he fixed them without reference to window-delivery and, indeed, in ignorance of the regulation, is evidence that may quite reasonably be accepted as true. This insurance in no way indicates a fraud or a step in a fraud in the sense that to any extent the respondents are relieved of their burden to prove that fraud.

This view of the matter deprives of much of its importance the final and determining factor in the conclusion reached by the Appellate Court. In the judgment of the Court, it is said :—

"There can be no doubt that the plaintiffs were fully aware of the rules as to window-delivery, and we are not prepared to believe them when they say that the amount for which the parcel would be insured with the Post Office was entirely a matter of chance, the amount being fixed on the spur of the moment without any reference to window-delivery or anything else."

The learned Judges, it will be seen, attribute that statement to, amongst others, the second appellant, and it was because they held him to be a witness of falsehood in that respect that they considered themselves entitled to reject, when uncorroborated, his evidence as to the posting of postal packet 217.

Now, for reasons already given, that statement imputed to the second appellant would not, had he made it, have seemed to their Lordships to be necessarily false. But the tragedy is that he made no such statement. His own insurances being with the Norwich Union, his postal insurances were usually Rs. 50, and so he said. He said nothing at all to the effect

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above imputed to the appellants generally, while as to the regulation, his evidence was that he was quite aware of its existence. It was the third appellant and not he who said he was ignorant of it. In other words, the conclusion of the learned Judges is based on a most regrettable mistake, and it follows that the only ground upon which they upheld what their Lordships have called the respondents' last contention cannot be sustained, and that the finding of the learned Trial Judge on this point must remain undisturbed. In the result postal packet 217 was the self-same packet of diamonds which had been made up in the office of the first appellant and handed to the second appellant to be posted.

And this same conclusion, perhaps not less certainly, may be reached in another way. The learned Appellate Judges, it will be remembered, found that the diamonds had been packed at the first appellant's premises, as deposed to by the witnesses present. It was their opinion also that if a dummy parcel was in fact posted, as they strongly suspected, each and all of these witnesses were privy to the imposture. The learned Judges, however, did not apparently pause to consider what possible purpose had been served by the making up of the parcel which they found had taken place, but which, on this further view, had been only an idle ceremony. Had they asked themselves that question, the answer to it, as their Lordships think, would not have been difficult. Once find, as both Courts did, that the parcel of diamonds was made up and handed for post to the second appellant, then the subsequent fraud can only be made even plausible by imputing it exclusively as a private and particular fraud to the second appellant and Mehta—as a fraud not only on the respondents, but on the first and third appellants as well. But a fraud confined to the second appellant and Mehta has never been even alleged by the respondents, and that presumably for a very sound reason. Had they made that charge, and had they failed to establish it, they would have been left in the unfortunate position of having, at all events temporarily, affirmed the honesty of Pandya, who was alone responsible for the fixing of the Post Office insurance. In other words, they would have deprived themselves of their main plank, unstable as it was, on which their charge of conspiracy rested. The result is that, so soon as the making up of the parcel is accepted, as it has been by

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both Courts, fraud in the posting can only be brought home by a limitation being imported into the charge, which has never been made.

The respondents did not ask at their Lordships' hand for a finding that their charge of fraudulent conspiracy had been made good. Their Lordships are accordingly dispensed from the task of dealing with this matter in detail.

But they have considered all the evidence with care, and certain aspects of the case not unfavourable to the appellants, but not alluded to in the judgments below, have been included in the statement of the facts which they have already made. And there are others. On the whole matter, their Lordships feel it to be due to the second and third appellants to say—the first appellant is now absolved by the admission of the respondents themselves—that in their judgment the evidence actually led ageinst them cannot be accepted as going any way at all towards proving the charge it was adduced to support. It is a matter of some surprise to their Lordships, who have considered it critically, that that evidence, as evidence against any of the appellants, and much less as evidence against all of them, should, when its nature and inspiration are remembered, have been so seriously regarded by the learned Appellate Judges.

In these circumstances the conclusion just announced is sufficient to dispose of the appeal, and their Lordships would have left its consideration there had it not been that two matters, exhaustively dealt with in the Courts below, raise questions of general importance. Their Lordships feel it to be their duty, therefore, to refer to them.

The first is the rejection from consideration by both Courts of the evidence given in the suit by Mehta. Mehta, in the box, had confirmed generally the evidence given by the second and third appellants and by Pandya as to the purchase and making up and despatch of the diamonds. By the Trial Judge the evidence of these witnesses was, on these matters accepted in its entirety; by the Appellate Court it was accepted except as to the evidence of posting given by the second appellant. Mehta's evidence, however, was rejected altogether, and that because of the finding of both Courts that he had offered the respondents' representatives in Burma to give

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evidence in their favour if he was paid by them the sum of Rs. 50,000.

It all arose in this way. One Bhattacharjee, an officer who had taken some part in the police investigation into the loss of the jewels, remained, while still attached to the police, actively interested in the preparation of the respondents' case. He sat by their counsel at the trial instructing him. Witnesses called by them—more especially the two chief witnesses in support of the case of fraudulent conspiracy, had been brought forward as a result of his activities. To the police, Mehta at an early stage had made his statement: that statement was in the possession of the respondents. It may be assumed that it was in accord with the evidence he gave at the trial, because he was in no way confronted with it as being in any way in conflict with his evidence as then given. After having made that statement, Mehta, it seems, suffered a robbery at his own house, and so again came into association with Bhattacharjee, who, it would appear, obtained a promise from Mehta that, notwithstanding his previous statement, he would for Rs. 50,000 make a full confession and a statement before a magistrate to the effect that the respondents' charge of fraud was true. Bhattacharjee, delighted with his success, although doubtful whether Mehta was not something of a humorist out to play a trick upon him, expressed to his chief at Rangoon his fear that the respondents would not be prepared to pay so large a sum as Rs. 50,000 on so doubtful a chance. He arranged, however, to bring Mehta to Rangoon in secret, unknown particularly to the second and third appellants, and there to put him in direct contact with the respondents' representatives. He first took him to their legal adviser. To that gentleman Mehta apparently repeated his proposal. But unsuccessfully. He rightly felt that such a suggestion was one which professionally he could not entertain, and Mehta was handed over to the respondents' manager at Rangoon. To him he made the same statement, and apparently—for that is the effect of the manager's evidence—his offer was rejected, not because it would have been discreditable or dishonourable to enter into any such corrupt bargain, but really because there was no certainty as to what the purchased evidence would be, while the price asked for it was exorbitant. Had Mehta been willing to accept the reward of Rs. 10,000

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previously offerd by the respondents for information as to the diamonds, the bargain, so the witness leaves it to be inferred, would have been struck. To Mehta, when he was called, these matters were put in cross-examination. He denied them all. It was put to him also that in connection with the preliminary police inquiry he had attempted to bribe the butler of the District Magistrate. It was suggested to him further that, in conversation with one Lalu Misser, he had stated that the whole case of the appellants was a swindle. When the case for the respondents was reached, they sought to contradict all these denials of Mehta by substantive evidence, adduced under section 155 (3) of the Evidence Act. The learned Judge permitted them so to do by calling Bhattacharjee, the respondents' manager at Rangoon, the District Magistrate's butler, and Lalu Misser. The last denied that Mehta had ever made any such statement to him; the others supported the stories which Mehta had denied. The learned Judge found that in these last denials Mehta had lied, and he accordingly refused to consider his evidence at all. Upon this two questions arise for discussion. The first is whether the evidence in rebuttal was properly admitted. Their Lordships are not prepared to hold that the evidence of Bhattacharjee and the respondents' manager on this issue was not properly received, but they think the section was stretched beyond its true purport in admitting the evidence of the butler and Lalu Misser. Sections 153 and 155 of the Indian Evidence Act must, in their Lordships' judgment, be stricty construed and narrowly interpreted if the Courts governed by that statute are to be spared the task in many suits of prosecuting, on most imperfect material, issues, which have no bearing upon that really in contest between the parties. Section 153 does not go far beyond, if it goes at all beyond, the case of *A. G.* v. *Hitchcock* (1), on which doubtless it was based.

So much for the legal aspect of this incident. Mehta was duly and rightly discredited, even although it may well be that the whole adventure on his part was, as Bhattacharjee feared it might be, no more than a grim joke—a trap into which he hoped the respondents might fall. But what surprises their Lordships is that while Mehta is duly de-

(1) (1847) 1 Ex. 91 : 154 E. R. 38.

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nounced, they find no word of judicial criticism of the part in the transaction played by Bhattacharjee, to say nothing of the respondents' manager. In their Lordships' view, that played by Bhattacharjee was little lees blameworthy than Mehta. If there were no persons ready to offer bribes for evidence favourable to their cause, there would be no bribed witnesses in Burmese or Indian Courts; the bribers stand to the bribed in these cases in a relation not unlike that in which the receivers of stolen goods stand to the thief. And when communications similar to those deposed to in this case are brought to the notice of the Court, they call for and should receive instant judicial condemnation. The respondents' legal representative did well to take no personal part in such a negotiation; but he ought himself instantly to have turned it down and advised his clients to have nothing to do with Mehta. Any negotiation on such a matter was as blameworthy in the lay client as it would have been derogatory to the professional man. In the view of their Lordships such an incident as is here disclosed must always, when brought under judicial notice, be instantly and sternly reprobated whether the King's justice is being administered in the East or in the West.

The second matter on which their Lordships feel it desirable to observe is the tendering and reception in evidence of the letter written by Bhattacharjee to his official chief on the 30th June, 1923. This letter was tendered and received under S. 157 of the Evidence Act. Their Lordships desire emphatically to say that the letter was not, under that section, properly receivable for any purpose. It was of no greater value as evidence, although it was calculated to do much more injury to impartiality than an anonymous letter. It is idle to suggest that the letter was tendered to fix a date, and to its malign influence may well be largely attributable the statement of the learned Trial Judge in his judgment,

"For some reason that I am unable to explain I feel that there is more in the case than meets the eye";

as well as the strong view against the appellants taken by the learned Appellate Judges. Its contents ought to have been excluded from judicial consideration in all Courts as completely as they have been ignored by their Lordships.

Their Lordships do not pretend that they have solved the mystery of these lost jewels. It is not their task, any more

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than it was the task of the Burmese Courts so to do. The judicial duty throughout has been to ascertain by evidence that the Court can receive whether the appellants have proved their case or whether the respondents have proved their defence. In their Lordships' judgment, so soon as the appellants had established, as they did, the making up and the posting of the parcel, the suit became practically undefended, and in the result it should have been so dealt with.

These are the reasons for their Lordships' humble advice to His Majesty that this appeal should be allowed, and the decree of the learned Trial Judge restored, with costs, both before the Board and in the Appellate Court.

Solicitors for appellants : *Bramall & Bramall.*

Solicitors for respondents : *Sanderson, Lee & Co.*

K. J. R. *Appeal allowed.*

Reporter's Note :—"Whether the evidence referred to in the *Second Exception* to S. 153, Evidence Act, can be given has been the subject of doubt in England. The Legislature has here answered the question in the affirmative, taking that view of the matter which was laid down by the Judges in the case of the *Attorney-General* v. *Hitchcock*, (1847) 1 Ex. 91=154 E. R. 38 ; Woodroffe and Amir Ali's Evidence Act, 5th Ed., p 879—K. J. R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATA ACHARIAR.

Senapathi Narayana Patrudu and others .. *Appellants* in both Second Appeals (Defts. 1 to 4, 7, 8 and 11 & Defts 1 to 4, 7, 8 and 10 respectively)*

v.

The Manager of Peda Marangi Estate, and others .. *Respondents in do. (Plaintiff and nil).*

Narayana Patrudu v. The Manager of Peda Marangi Estate.

Madras Estates Land Act, Ss 25, 30, 45 and 77—Scope of—Grant of melwaram of land as service inam—Resumption of inam—Suit for rent under S. 77—Rent not previously fixed or ascertained—Duty of Court to ascertain the amount of rent—Proper method of ascertaining the rent—Fair and reasonable rent—Question of fact—Interference in second appeal—Liability for interest on rent.

The plaintiff granted the melwaram of the suit land, which was admittedly ryoti land, as inam to the defendants' predecessors in lieu of service. In 1914 the plain-

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*S. A. Nos. 1550 and 1551 of 1922. 8th September, 1927.

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tiff resumed the inam. There was some litigation about the matter of the resumption but the Civil Court eventually in 1918 upheld it. The plaintiff brought the present suit under S. 77 of the Madras Estates Land Act for arrears of rent on the land from the date of resumption. The defendants pleaded that, since the rent was not ascertained, no rent having been paid for the period during which the inam was in force, no suit for rent would lie until the rent had been ascertained.

Held (1) that there was no special procedure or agency provided in the Madras Estates Land Act by which, in any and every case, the amount of rent was to be separately fixed or ascertained before a suit for it could be filed, and, in all cases where the rent was not ascertained under S. 25, S. 30 or S. 45 or was not already fixed, the court in a suit under S. 77, when the amount of rent was in dispute, should, as part of its duty, ascertain the amount of rent;

Mallayya v. Narayanagajapathiraju, (1924) 21 L W. 42, referred to.

Raja Rangayya Appa Rao v. Bobba Sriramulu, (1903) L. R. 30 I. A. 17 : I.L R 27 M. 143 : 14 M. L. J. 1 (P. C.), distinguished;

(2) that the present suit did not fall under either S. 30 or S. 45 of the Madras Estates Land Act, nor did it fall under S. 25, as the defendants were in possession of ryoti land all along and could not be said to have been admitted to possession of ryoti land on the date of the resumption, the land not having been in itself the inam;

(3) that the proper method of ascertaining the rent in this case was to ascertain the rate prevailing for similar lands with similar advantages in the neighbourhood, as there was no reason why on resumption the defendants should not pay what a newly admitted tenant would be bound to pay;

and (4) that the defendants, having retained possession of the money which ought to have been paid by them to their landlord and had the benefit of the interest on it, must pay interest on the amount of rent for each fasli from the first day of the succeeding fasli.

What is the fair and reasonable rent on the land is really a question of fact and in second appeal the court cannot go into the question of the correctness of the rate of rent, provided the principles upon which the rate has been ascertained are legally correct.

The court trying a suit under S. 77 of the Madras Estates Land Act has, in the case of S. 25, a duty to hold the ryot bound to pay rent at a rate not exceeding the rate prevailing for similar lands with similar advantages in the neighbourhood if such information is available, and, in the case of S. 45, has a duty to decide what is the rent fixed on the land, and it is only when the trying court cannot decide these points that an application has to be made to the Collector to fix the rent.

Second appeals against the decrees of the District Court of Vizagapatam in Appeal Suits Nos. 294 of 1919 and 221 of 1921 preferred respectively against the decrees of the Court of the Sub-Collector of the Parvathipur Division in E. L. Suits Nos. 110 of 1918 and 74 of 1921.

P. V. Rangaram for Appellants.

V. Govindarajachari for 2nd Respondent.

The Judgment of the Court was delivered by

Wallace, J.

Wallace, J.—These are two appeals under the Madras Estates Land Act. The suits were filed under S. 77 of the Act by the plaintiff-landlord against the defendants for arrears

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of rent. One of the suits is filed for the arrears of faslies 1325 to 1327 and the other for faslies 1328 to 1330.

The facts necessary for disposal of the appeals are that plaintiff granted melwaram of the suit land, which is admitted to have been ryoti land, as inam to the defendants' predecessors in lieu of service. In fasli 1325 (December, 1914) the plaintiff resumed the inam. There was some litigation about the matter of this resumption, but the Civil Court eventually on 27th February, 1918, upheld it. The plaintiff now sues for arrears of rent on the land from the date of resumption. The lower appellate Court fixed the annual rent at Rs. 600 and has decreed that sum for the suit faslies with interest, and the defendants appeal. They do not dispute that they are bound to pay rent. They argue that, since the rent was not ascertained, no rent having been paid for the period during which the inam was in force, no suit for rent under S. 77 lies until the rent has been ascertained, because until then it is an anomaly to speak of rent "being due" or of an "arrear of rent."

The learned Vakil for the appellants pressed on us the contention that the scope of the Act was that Chapters III and IV were intended to deal with proceedings for the ascertainment of rent, Chapter V with the payment of rent, and then Chapter VI with the recovery of rent by a suit or distraint, and argues therefrom that, unless the rent has been ascertained under Chapter III or Chapter IV or has been already fixed, no suit under Chapter VI will lie for its recovery. We are unable, however, to hold that the Act does actually contain any such comprehensive or exhaustive scheme. The only sections in Chapters III and IV which deal with ascertainment of rent are Ss. 25, 30 and 45, and these deal with certain exceptional cases and leave untouched the ordinary case of rent due by an occupancy tenant. There is in fact no special procedure or agency provided in the Act by which in any and every case the amount of rent is to be separately fixed or ascertained before a suit for it can be filed. To hold, as the appellant contends, that, in all cases to which S. 25, S. 30 or S. 45 do not apply, the rent must be ascertained by a tender of patta and a suit thereon, is to hold that, for the extraordinary cases a simple procedure has been provided, but, for the ordinary cases a most cumbrous procedure has been prescribed. We cannot agree that this is the meaning of the Act.

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Obviously then the Act intended that in all cases where the rent was not ascertained under S. 25, S. 30 or S. 45, or is not already fixed, the Court in a suit under Section 77, when the amount of rent is in dispute, should as part of its duty ascertain the amount. And this is no new procedure. After all, rent which has been or is fixed only means the rent which has been uniformaly and lawfully paid for a series of years or a rent agreed upon by the parties or a rent which has been already determined by a decree of Court. In the first two cases, if there is any dispute as to the amount of rent, the authority to decide that dispute must in the last resort be the Court. Probably in 99 per cent. of suits under Section 77, the amount of rent is in dispute and has not been fixed previously by Court or agreement. Parties come to court because they cannot agree as to the rate of rent. To accede to the appellants' argument that a suit under Section 77 will only lie if the rent has been fixed by some other authority than the trying Court would be to hold that the great majority of the suits tried under Section 77 and all the suits in which the Court has in the slightest degree interfered with the amount of rent claimed were not maintainable in law, and that in a maintainable suit under Section 77 the defendant cannot be heard to say that the amount of rent is not correct because it must have been already fixed. To such a desperate conclusion we do not consider ourselves compelled to come. Our view is that taken by a single Judge of this Court in *Mallayya* v. *Narayanagajapathiraju* (1). The appellant has referred us to a Privy Council decision under Act VIII of 1865 reported in *Rangayya Appa Rao* v. *Bobba Sriramulu* (2). But the procedure under that Act was so different from the procedure under the presnt Act that that decision has in our opinion no bearing on the present case. Under Act VIII of 1865 the rent had to be fixed by the Revenue Court usually by a suit for acceptance of patta, and when it had been so fixed then the suit for rent was brought in a Civil Court. But under the present Act it is the Revenue Court itslef that entertains the suit for rent.

Now if Section 77 applies to the ordinary case in which parties are disputing about the rate of rent, there is no reason why it should not apply to unusual cases which are not covered

1. (1924) 21 L. W. 42.
2. (1903) L. R. 30 I. A. 17 : I. L. R. 27 Mad. 143 : 14 M. L. J. 1 (P. C.)

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by Sections 25,30 and 45. In fact, even with reference to sections 25 and 45, it is clear that the Court trying a suit under Section 77 has, in the case of Section 25, a duty to hold the ryot bound to pay rent at a rate not exceeding the rate prevailing for similar lands with similar advantages in the neighbourhood if such information is available, and, in the case of Section 45, has a duty to decide what is the rent fixed on the land, and it is only when the trying Court cannot decide these points that an application has to be made to the Collector to fix the rent. To uphold his argument the appellant's vakil had to contend that, though in these two sections an application to the Collector was prescribed only in the second alternative mentioned, yet the sections must mean that application had to be made to the Collector even in the matter of the first alternative. This contention seems to us wholly untenable on the language of the sections.

Now the present case is a suit for arrears of rent in which the amount of rent has to be determined, and it is a case which does not appear to come under S. 25, S. 30 or S. 45. It is quite clear that it does not come under either S. 45 or S. 30. Some argument before us centred round the question whether it comes under Section 25, that is, whether it can be said that the defendant was a person admitted by the landlord to possession of ryoti land from the date of resumption of the inam. The lower appellate Court held that he was. The defendants in the lower Courts maintained that Section 25 did apply. Here, however, their learned Vakil has taken up the opposite position and maintains that it does not. The plaintiff also maintains that it does not apply. As the land was all along *ryoti* and was not in itself the inam, it is not excluded from the definition of ryoti land given in Section 3, 16 (c)—*See Rajah Venkata Ramayya* v. *Veerasami* (3). Hence the defendant was in possession of ryoti land all along, and was not 'admitted' to possession of it on the date of the resumption. It appears to us, therefore, that the District Judge was wrong in his view that he was so admitted and that Section 25 applies. The provisions of that section therefore are also not applicable.

The suit, therefore, falls under Section 77, and none of these exceptional sections applies. In such a suit, as we have

3. (1917) I. L. R. 41 Mad. 554 · 34 M. L. J. 309.

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already held, when the rent is not already agreed upon or known and therefore has to be fixed or ascertained, it is the duty of the trying Court to ascertain it. One method of doing that, which, for example, it is bound to apply under Section 25, is to ascertain the rate prevailing for similar lands with similar advantages in the neighbourhood. Such a principle may well be applied to a suit for rent against a tenant when the rent is not already known or fixed. Such a method has been the one adopted by the lower courts in the present case and it seems to us a method justified both by law and in equity. There is no reason why the defendants should occupy the land at a lower rate than a ryot admitted newly to the land would have to pay."

The lower appellate Court has fixed the amount of rent on this basis at Rs. 600 per annum. It has been contended by the appellants that the rate of rent should not be increased beyond Rs. 140 which apears to have been the sum which was being paid before the creation of the inam or at least should be not more than Rs. 450 per annum which was the figure which the plaintiff entered in 1905 in his accounts, Ex. M, as the nominal rent for purposes of calculation of road cess at the time when the inam was still unresumed. The plaintiff himself claimed Rs. 800. As we have said, there seems no obvious reasons why on resumption the defendant should not pay what a newly admitted tenant would be bound to pay. What is the fair and reasonable rent on the land is really a question of fact, and in second appeal we will not go into the question of the correctness of that rate, provided the principles upon which that rate has been ascertained are legally correct. We decline to interfere with the finding of the lower appellate court on this point.

Finally a question of interest was raised, but we can see no reason why interest should not be awarded. The defendant has retained possession of the money which ought to have been paid by him to his landlord and has had the benefit of the interest on those sums. The decree will, however, have to be slightly altered to fix the dates from which interest is payable and it will be declared that interest for each fasli is payable from the first day of the succeeding fasli. With this modification we dismiss the appeals with costs (one pleader's fee).

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A memorandum of objections has been filed by the Respondent which is concerned with the reduction by the lower appellate Court to Rs. 600 of the trial Court's figure of Rs. 650. We do not see that the lower Appellate Court has committed any error of law in fixing the figure at Rs. 600 and we therefore dismiss the memorandum of objections.

N. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

S. S. Jagannadhaswamy Naidu .. *Petitioner* (Accused in C. C. No. 80 of 1926 on the file of the Joint 1st class Magistrate of Narasapur).*

v.

T. Manikyam .. *Respondent (Complainant in do.)*

Jagannadhaswamy Naidu v. Manikyam.

Criminal Procedure Code—S. 197—Tahsildar acting as polling officer in municipal election—Offence under S. 58 of District Municipalities Act by—Prosecution for—Sanction of Local Government—Necessity.

The sanction of the Local Government under S. 197 of Criminal Procedure Code is not a condition precedent to the institution of criminal proceedings under S. 58 of the District Municipalities Act against a Tahsildar who acted as a polling officer in connection with a municipal election.

While acting as a polling officer, a Tahsildar is not acting or purporting to act in the discharge of his official duty as a Tahsildar within the meaning of S. 197, Criminal Procedure Code.

The fact that the Tahsildar was appointed a polling officer only after obtaining the permission of the Collector does not affect the position.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, West Godavari at Ellore, in Criminal Revision Petition No. 23, presented to revise the judgment of the Court of the Joint 1st class Magistrate of Narasapur in Calendar Case No. 80 of 1926.

P. Venkataramana Rao for petitioner.

V. Suryanarayana for respondent.

The Public Prosecutor for the Crown.

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* Crl. R. C. No. 372 of 1927. (Crl. R. P No. 328 of 1927). 23rd September, 1927.

The Judgment of the Court was delivered by

Madhavan Nair, J. :—This petition raises the question whether sanction under S. 197 of the Criminal Procedure Code should be obtained before instituting criminal proceedings against a Tahsildar who acted as a polling officer in connection with a municipal election.

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The facts are briefly these :—Under G. O. No. 1367, L. & M., dated April 3, 1925 .. .. .. where a Chairman of a Municipal Council or the President of a Local Board desires to have the services of an officer of the Revenue Department for the conduct of a particular election he may apply to the Collector and the Collector may spare an officer's services if he is able to do so. Acting under the Government Order, the Chairman of the Ellore Municipality obtained from the Collector the services of the petitioner, a Tahsildar, to act as a polling officer in the 5th Ward of the Ellore Municipality during a recent municipal election. It is alleged that, while acting in that capacity, the petitioner committed an offence under S. 58 of the District Municipalities Act, which runs as follows :—

"Every person who in the course of electoral operations falsifies or attempts to falsify the record of an election by removing, destroying, altering or fabricating nomination papers or voting papers or by any other act or by any omission, shall be punishable with imprisonment of either description which may extend to one year or with fine or with both."

The case against the petitioner is described in paragraphs 6 and 7 of the complaint. Paragraph 7 runs thus :—

"The accused wilfully marked the votes wrongly and falsified and attempted to falsify and fabricate the records of the election and committed an offence punishable under S. 58 of the Madras District Municipalities Act and also Ss. 465 and 469 of the Indian Penal Code."

It is not necessary for the purposes of this case to state the facts of the complaint in greater detail.

When the case was taken up for trial, objection was taken on behalf of the petitioner that this is a case in which sanction of the Government is necessary under S. 197 of the Criminal Procedure Code and that, as such sanction had admittedly not been obtained, the complaint should be dismissed. Upholding the objection the joint Magistrate dismissed the complaint. The learned Sessions Judge on revision set aside the order of the Joint Magistrate and directed him to dispose of

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the case according to law. The present revision petition is against the order of the Sessions Judge.

S. 197 (1) of the Criminal Procedure Code runs as follows :—

"When any person who is a Judge within the meaning of S. 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removeable from his office save by or with the sanction of a Local Government or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Local Government"

To establish the contention that sanction should have been obtained, the petitioner has to show (1) that he is a public servant who is not removeable from his office save by or with the sanction of the Local Government and (2) that he is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. If either of these conditions does not apply to the petitioner, then clearly it is not necessary to obtain the previous sanction of the Local Government to institute proceedings against him. Following the argument of the learned Vakil for the petitioner, dealing with the second question first, we have to see whether the petitioner, while acting as a polling officer under the District Municipalities Act, was acting or purporting to act in the discharge of his official duty, his official duty being that of a Tahsildar. It is alleged that, because the Collector has lent the petitioner's services to the Chairman, notwithstanding the fact that he was acting as a polling offieer, he still remains a Tahsildar and was acting or purporting to act in the discharge of his official duty as a Tahsildar. No direct authority in support of the argument has been brought to our notice. Under R. 8 (1) of the Rules for the Conduct of Elections of Municipal Councillors

"If owing to their being more candidates than there are vacancies, a poll has to be taken, the Chairman shall appoint forthwith one or two polling officers for each polling station and may pay them reasonable remuneration for their services."

It is conceded that the petitioner, when his services were lent to the Chairman, was appointed as a polling officer by the Chairman, and that it was after this appointment that he began to discharge the duties of a polling officer. In certain cases it is the duty of the Municipal Chairman to appoint a polling officer, and the polling officer acquires the status of a polling officer by the appointment by the

Municipal Chairman. The Municipal Chairman may appoint any person he likes as a polling officer subject to the restrictions contained in the rule. The fact that the officer so appointed happens to be a Tahsildar or that he was appointed after obtaining the permission of the Collector does not affect the decision of the question. We are of opinion that the person appointed, though he is a Tahsildar, was, for the time being, not acting or purporting to act in the discharge of his official duty as a Tahsildar and, therefore, S. 197 of the Criminal Procedure Code can have no application. As one of the essential conditions necessary for the application of the section is not satisfied in this case, it is not necessary to consider the other condition, namely, whether the petitioner is a public servant who is not removeable from his office save by or with the sanction of the Local Government.

Jagannadhaswamy Naidu v. Manikyam. — Madhavan Nair, J.

We think the order of the Sessions Judge is right and dismiss this criminal revision petition.

A. S. V. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Venkat Subba Shrinivas Hegde .. *Appellant** (*Defendant.*)

v.

Subba Rama Hegde .. *Respondent* (*Plaintiff.*)

P. C. — Venkat Subba Shrinivasa Hegde v. Subba Rama Hegde.

Transfer of Property Act, 1882, *Ss.* 122 *and* 123—*Deed of gift delivered to donee—Donor not competent to revoke gift before registration.*

Where the donor of immoveable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument. The decision of the majority of the learned judges in *Atmaram Sakharam* v. *Vaman Janardhan*, (1924) I. L. R. 49 Bom 388 (F. B.), followed.

Registration does not depend upon the donor's consent, but is the act of an officer appointed by law for the purpose, who, if the deed of gift is executed by or on behalf of the donor and is attested by at least two witnesses (see Ss. 122 and 123, Transfer of Property Act, 1882), must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. *Kalyana Sundaram Pillai* v. *Karuppa Mooppanar*, (1926) L. R. 54 I. A. 89 : I. L. R. 50 Mad. 193 : 53 M. L. J. 346 (P. C.), relied on.

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*P. C. Appeal No. 96 of 1926. 24th January, 1928.

P. C.

Venkat Subba Shrinivasa Hegde v. Subba Rama Hegde.

Judgment of the High Court, reported in *Subba Rama v. Venkatsubba* (1), reversed.

Appeal (No. 96 of 1926) from a judgment and decree of the High Court, Bombay (Macleod, C. J., and Shah, J.), dated the 25th February, 1924, allowing a second appeal by the respondent from a judgment of the District Court of Kanara, dated the 9th June, 1922, which dismissed a first appeal by the respondent from a judgment of the Subordinate Judge of Honavar, dated the 7th February, 1921, in favour of the appellant.

The facts of the case appear sufficiently from the report in the Court below ; see *Subba Rama* v. *Venkatsubba* (1).

Raikes for appellant.

The respondent was not represented at the hearing.

Their Lordships' judgment was delivrred by

Lord Shaw.

LORD SHAW :—The circumstances of this case need not be referred to further than as follows : The object of the suit was to set aside a certain deed executed by the deceased plaintiff on the 26th June, 1919. By that deed certain property was transferred to the appellant. The deed was attacked as having been granted and delivered while the grantor was in ill-health and under undue influence ; elements of fraud were also introduced. It may be said at once that the whole of these allegations were tested before the Subordinate Judge and, on appeal from the Subordinate Judge, by the District Court, and all the allegations were disproved. Therefore that element of attack disappears from the case.

There remains, however, this further point which until a few years ago was one of much contention in India. The point is, that the deed, which was a deed of gift of immovable property, was granted and delivered upon a certain day, but was not registered until certain events happened. Those events included the principal one, namely, that the grantor himself seems to have changed his mind. He not only did so, but he brought a suit which contained an application for an injunction against the registration by the donee of the deed of gift.

Upon this question of possible stoppage of effect to be given to the deed, the facts in this case are clear: the deed itself

1. (1924) I. L. R. 48 B. 435.

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was, as stated, delivered to the donee. The donee, therefore, in pursuance of that deed delivered to him, proceeded to register the deed and it was registered pending the litigation which had been raised, of which the present appeal is the outcome. The point at issue is thus expressed by the Judges of the High Court :—

"Can a donor of immovable property, when the gift can only be effected by a registered document, resile from his action before the document had been registered, and, if the donee refused to give back the document, can the donor obtain an injunction from the Court restraining the donee from proceeding to register the document ?"

In granting leave to appeal in this case the High Court delivered in admirably brief form the reasons why the decision, if allowed to stand, would upset the law in India as now settled, and put it in conflict with the latest decisions.

"The point of law involved in the case is whether a donor can revoke a gift before the gift deed has been registered on the ground that the gift is not completed until the deed is registered. In the present case this Court decided that the gift was not completed until the deed had been registered. Therefore the donor could revoke it before the deed was registered. This decision has been overruled by a decision of the Full Bench in *Atmaram Sakharam* v. *Vaman Janardhan* (2), in which judgment was delivered in October, 1924."

That was the position in which the appeal was allowed to this Board. But since this happened, the case of *Atmaram Sakharam* v. *Vaman Janardhan* (2) has been approved in a subsequent case before this Board. A judgment has been pronounced by their Lordships which appears to be completely apt, and entirely in favour of the appellant in the present case. It is the case of *Kalyana Sundaram Pillai* v. *Karuppa Mooppanar* (3). The head-note is as follows :—

"A Hindu executed a deed of gift of part of his immovable property and delivered it to the donee. On the following day he adopted a son. Three days later he registered the deed :—Held, that the gift was valid against the adopted son. On delivery of the deed to the donee there was an acceptance of the transfer within section 122 of the Transfer of Property Act, 1882, and thereupon the gift became effectual, subject to its registration as required by section 123."

Then it records that the case of *Atmaram Sakharam* v. *Vaman Janardhan* (2), which was referred to by the High Court Judges, was approved.

It is not necessary to go over the facts of this case further than is stated, but the following passage is directly in point. With regard to the proposal to prohibit the registrar from

2. (1924) I.L. R. 49 B. 388 (F. B.).
3. (1926) L. R. 54 I A. 89=I. L. R. 50 M. 193=53 M. L. J. 346 (P C.).

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registering the deed, as is made in this case, Lord Salvesen, on behalf of the Board, says —

"Registration does not depend upon his (the donor's) consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it, if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."

It would be a waste of words and time to go further than that judgment, and it is sufficient to say that it appears to rule the present case.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and the decree of the Subordinate Judge restored, with costs in the Courts below and before their Lordships.

Solicitors for appellant : *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Thakur Bhagwan Singh .. *Appellant** (*Plaintiff.*)

v.

Darbarsingh .. *Respondent* (*Defendant.*)

P. C.

Thakur Bhagwan Singh v. Darbarsingh.

Central Provinces Land Revenue Act, 1917—*Protected Thekadar—Rights of other members of the family—Tenure impartible and inalienable.*

The tenure of a protected Thekadar under the Central Provinces Land Revenue Act, 1917, is impartiable and inalienable, but though the *theka* is made impartible by statute, the Act contemplates that it may nevertheless be the joint property of the Thekadar and his family.

The rights of the other members of the Thekadar's family discussed.

Appeal (No. 54 of 1927) by special leave from a decree of the Court of the Judicial Commissioner, Central Provinces (Hallifax, A. J. C.), dated the 15th April, 1924, reversing an appellate decree of the Court of the District Judge of Raipur, dated the 27th February, 1923, which had varied and extended in the appellant's favour a decree of the Subordinate Judge of Bilaspur.

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* P. C. Appeal No. 54 of 1927. 6th February, 1928.

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The appellant brought the suit to eject the respondents, his nephews, from, and recover sole possession of, the protected rights of the Mauza of Bodtara (of which he was the Thekadar) with cultivating rights and of a house and its compound therein.

The question in the appeal to His Majesty in Council was whether the appellant was entitled to *sole* possession, as the District Judge held, or only to joint possession with the respondents, as the Judicial Commissioner held.

The facts of the case appear from their Lordships' judgment, aud also from the report of the case in the Court below, see *Khedu Singh* v. *Bhagwan Singh* (1).

De Gruyther, K. C., and *Raikes* for appellant.

Wallach for respondent.

Their Lordships' judgment was delivered by

Sri John Wallis

SIR JOHN WALLIS:—The question for decision in this case is a short one. The suit was brought by the plaintiff, Thakur Bhagwan Singh, who has the status of a Protected Thekadur under Chapter IX of the Central Provinces Land Revenue Act, 1917, in respect of the village of Bodtara, against his nephews Khedu Singh and Darbar Singh, who are members of the joint family (of which he is admittedly manager), for possession of the entire village and of the house and compound at Bodtara, from which he had been excluded by the defendants, and as to which he claimed to be entitled to possession under section 109 of the aforesaid Act. The defendants pleaded, among other things, that they had lived with the plaintiff in the family house at Pandaria until he and his family began to ill-treat them, and had then removed to Bodtara and had taken joint possession, along with the plaintiff, of the village and house. Whether they had a right to do so was the subject of the first issue:

"Whether the plaintiff was entitled to absolute possession on the strength of his protected status certificate even though the defendants be held to be co-sharers in the theka with the plaintiff?"

The subordinate Judge gave the plaintiff a decree for possession of the village and a declaration that he was entitled to remain in possession of the village so long as he was the holder of the certificate of protected status, but that as regards

1. (1923) 79 I. C. 400.

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the house, the suit should stand dismissed as premature, and that the defendants, as against the plaintiff should remain in possession until ousted as the result of a suit for partition or as the result of an amicable arrangement. On appeal the District Judge found that the house was an essential adjunct of the village, and modified the decree by giving the plaintiff a decree for possession of the house as well as of the village. The case then came on second appeal before the Court of the Judicial Commissioner, who altered the decree of the lower appellate court, granting the plaintiff exclusive possession of the village and house, into a decree for joint possession with the defendants. From this deeree the plaintiff obtained special leave to appeal to His Majesty in Council.

The position of a protected Thekadar is that, under section 108 of the Act, he holds the lands included in the theka under a lease on terms setteld after inquiry by the revenue authority but executed by the proprietor (or in case of refusal by the revenue authority for him), subject to forfeiture as provided in section 111 of the Act, one ground of forfeiture being his refusal to execute a kabulyat or counter-part of the lease. On the expiry of the lease he is entitled to renewal under clause (*c*) of sub-section (1) of section 109, and under clauses (*a*) and (*b*) of the same sub-section, his tenure is made impartible and inalienable, and it is provided that on his death the succession thereto is to be regulated by the personal law of the deceased Thekadar, subject to the condition that only one person at a time shall succeed and that such person shall be chosen as therein provided. This being the position of the Thekadar, it follows, in their Lordships' opinion, that he is entitled as lessee to possession of the demised premises, at any rate in the absence of the arrangement hereafter mentioned. At the same time the Act recognises that the leasehold interest, though impartible, may nevertheless be the joint property of the Thekadar and his family; and it is provided in clause (*a*) of sub-section (1) of section 109 that

"nothing herein contained shall prevent a protected Thekadar or any member or members of his family who would be entitled to share in the theka or to be maintained out of its income from making any arrangement, binding on themselves only, for the joint or divided management and enjoyment of the village or part thereof.".

It has not been suggested that there was any such arrangement binding the Thekadar in this case.

Section 112 is as follows :

P.C.

Thakur Bhagwan Singh v. Darbarsingh.

Sir John Wallis.

"Subject to rules made under section 277, the District Commissioner may, on the application of any member of the family of a protected Thekadar who is entitled to be maintained out of its income, transfer the theka to any such member of the family who shall thereupon become the protected Thekadar: Provided that such removal shall not deprive the protected person removed of his interest in the theka."

This remedy is no doubt given to the other members of the family in lieu of the right to sue for partition, of which they have been deprived in consequence of the theka being made impartible by statute.

As regards the house and compound at Bodtara, they were specifically claimed in the plaint, and it was not alleged in the written statement that they stood on a different footing from the rest of the village.

Consequently no issue was raised and no evidence recorded on the point. In these circumstances the District Judge found that the house was an essential adjunct to the village in connection with the possession and management thereof. This was a finding with which, in their Lordships' opinion, there was no sufficient reason for interfering in second appeal.

This is sufficient to dispose of the case, and, as the plaintiff's case in the plaint was based on his position as protected Thekadar and not on his position as managing member of the joint family in respect of all their properties, it is unnecessary to consider whether he would not be entitled in that capacity also to maintain the suit as to the house and compound even if they did not go with the theka.

For these reasons their Lordships are of opinion that this appeal should be allowed, the decree of the Judicial Commissioner set aside and the decree of the District Judge restored. The appellant should have his costs in the courts below and of the appeal. They will humbly advise His Majesty accordingly.

Solicitors for appellant : *Watkins and Hunter.*

Solicitors for respondent : *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

R. A. Arunachala Iyah .. *Petitioner** (*Appt. in O. S. A. No. 58 of 1926 on the file of the High Court*)

v.

Louis Dreyfus & Co. .. *Respondents* (*Respts. in do.*)

Arunachala Iyah v. Louis Dreyfus & Co.

Costs—Arbitration—Reference to, invalid—Award in case of—Costs of—Jurisdiction of High Court to award—Arbitration Act, S. 17—Civil Procedure Code, S. 35—Costs—Meaning.

The High Court has no jurisdiction to pass an order as to costs of an award in a case in which there was no valid reference to arbitration.

The word "costs" in S. 17 of the Arbitration Act and in S. 35 of Civil Procedure Code refers to costs incurred in court. The costs incurred before an arbitrator or umpire cannot be regarded as the costs of " a proceeding in the High Court."

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the Taxing Officer and Commissioner of the High Court to tax the Bill of Costs filed by the petitioner, Appellant in O. S. A. No. 58 of 1926, preferred against the judgment of the Hon'ble Mr. Justice Waller, dated 30th April, 1925, and the order dated 6th May, 1926, passed in the exercise of the Ordinary Original Civil Jurisdiction in the matter of the Indian Arbitration Act, IX of 1899, and in the matter of the arbitration between Louis Dreyfus & Co. and R. K. Rajagopala Aiyar & Brothers and R. A. Arunachala Iyah by including therein the costs incurred by him before the Umpire in the said matter or in the alternative, making it clear that the decree of the High Court, dated 12th September, 1927, and passed in the said O. S. A. No. 58 of 1926, included such costs.

K. S. Krishnaswami Aiyangar for *S. Subramania Aiyar* for Petitioner.

Vere Mockett, instructed by *Moresby & Co.,* for Respondents.

The Court made the following.

ORDER :—The question raised is new and there is very little to guide us. The decision in *Swift & Co.* v. *Board of*

* C. M. P. No. 4807 of 1927. 12th December, 1927.

Trade (1) does not help us. That in *Wimshurst Hollick & Co. v. Barrow Ship-building Co.* (2) furnishes some analogy. The costs incurred before the arbitrator or umpire cannot be regarded as the costs of "a proceeding in the High Court", but are the costs of a tribunal unconnected with this Court. The word 'costs' in S. 17 of the Arbitration Act and in S. 35 of the Civil Procedure Code refers to costs incurred in Court. If there is a valid award and the award itself provided for the costs, then the matter rests on a different footing. But where, as in this case we hold that there is no valid reference to arbitration, we do not see what jurisdiction we have to pass an order as to costs of the award. The petition is dismissed. There will be no order as to costs.

Arunachala Iyah v. Louis Dreyfus &Co.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Gamini Rangayya ... *Appellant** (*Plaintff*)

v.

Rajahmundry Municipal Council, represented by the Chairman .. *Respondent* (*Deft.*)

Madras District Municipalities Act, V of 1920—S. 182—Encroachment, title to which became perfected before Act—Removal of—Power of municipal council.

Under S. 182 of the District Municipalities Act of 1920 a municipal council has power to remove an encroachment, the title to which became perfected before the commencement of the Act.

The section draws no distinction between a title perfected before the coming into force of the Act and a title perfected after its coming into force.

Gamini Rangayya v Rajahmundry Municipal Council.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal suit No. 115 of 1924 (A. S. No. 273 of 1923 of the District Court), preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. No. 52 of 1922 (O. S. No. 363 of 1922, Principal District Munsiff's Court, Rajahmundry.)

G. Lakshmanna for appellant.

P. Somasundaram for Respondent.

The Judgment of the Court was delivered by

Phillips, J.

Phillips, J :—The contention raised by the appellant is that under S. 182 of the District Municipalities Act V of 1920

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* S. A. No. 556 of 1925. 19th December, 1927.

1. L. R. (1926) 1 K. B. 131. 2. (1877) L. R. 2 Q. B. D. 335.

Gamini Rangayya v. Rajahmunbry Municipal Council.

Phillips, J.

a municipal council is not empowered to remove an encroachment, the title to which became perfected before the commencement of the Act. There is nothing in S. 182 to suppose that any distinction is drawn between a title perfected before the coming into force of the Act and a title perfected after its coming into force. Cl. (1) states in very general terms that any projection, encroachment or obstruction may be removed or altered. If the legislature had intended to except any class of encroachments from this rule, one would naturally expect a special clause to that effect. Instead of inserting such a clause, the legislature has enacted cl. (2) which says that when the projection, etc., has existed for a period sufficient under the law of limitation to give a prescriptive title, then it shall be liable to removal, but the council shall pay reasonable compensation. Therefore only two points are dealt with in that section: (1) removal of lawful projections and (2) removal of unlawful projections, and no distinction is drawn between projections which became lawful before the commencement of the Act and projections which became lawful after its commencement. The Subordinate Judge was therefore right in holding that the council were entitled to remove the plaintiff's encroachment and that therefore his suit for injunction must fail. The second appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Kavuri Subbiah .. *Petitioner** (*3rd Respondent*)

v.

Yabursu Bala Tripurasundara Boyamma .. *Respondent* (*Petitioner*).

Subbiah v. Bala Tripurasundra Boyamma.

Civil Procedure Code, 1908—Order 33—Petitioner in petition for leave to sue in forma pauperis—Death of, before grant of leave—Legal representative's right to continue proceedings as a pauper.

Where the petitioner in an application for leave to sue in *forma pauperis* dies before leave is granted, his or her legal representative has no right to continue the application itself for being allowed to sue in *forma pauperis*. The legal representative may, however, apply to be allowed to continue the petition as a suit on payment of the necessary court-fee.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise

* C. R. P. No. 785 of 1927. 20th October, 1927.

Subbiah v. Bala Tripurasundra Boyamma.

the order of the Court of the Subordinate Judge of Masulipatam dated 21st February, 1927, and made in I. A. No. 1239 of 1926 in O.P. No. 10 of 1926.

P. Panini Rao for Petitioner

Respondent not represented.

The Court delivered the following

JUDGMENT :—The respondent in this Civil Revision Petition has not appeared and therefore on behalf of the petitioner it has been argued *ex parte*. But giving the matter such consideration as I have been able to give, I have come to the conclusion that the order of the lower court was clearly wrong and without jurisdiction. The petitioner in this court was 3rd respondent in a petition for leave to sue in *forma pauperis*. Pending the disposal of that petition the petitioner died and thereupon the respondent in this Court applied to the lower court as the mother and legal representative of the deceased petitioner to be brought on the record as the legal representatve of the deceased petitioner and for being allowed further to prosecute the petition. I do not see anything in the petition itself to the effect that she was either prepared to continue the proceedings paying the necessary court-fee in respect of the petition allowing the same being treated as a plaint or anything to show that she herself is a pauper. The learned Subordinate Judge allowed the petition and directed that the respondent in this court be brought on the record as such legal representative. The petition for leave to sue in *forma pauperis* is undoubtedly a personal application on a personal ground. If there can be anything that can be set up or regarded as a cause of action for such a petition, it cannot possibly be conceived of as surviving to the legal reprepresentative. There is the direct authority of the Calcutta High Court in the matter. In *Lalit Mohan Mandal* v. *Satish Chandra Das* (1) Ghose, C. J., and Caspersz, J., held that where there is only an application for leave to sue in *forma pauperis*, but no suit pending in court, and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive in the legal representative of the deceased applicant. I am in entire agreement with the deision in that case. The learned Sub-

1. (1906) I.L.R. 33 C. 1163.

Subbiah v. Bala Tripura-sundara Boyamma.

ordinate Judge in the court below seems for some reason to have regarded my decision in *Sivagami Ammal* v. *Gopalaswami Udayar*(2) as an authority for the position that the right to continue the application in such circumstances survives to the legal representative. In that case the petition to sue in *forma pauperis* had been allowed and the matter was registered as a suit. It was during the pendency of the suit that the plaintiff died. In these circumstances it clearly followed that, in a proceeding which was properly pending as a suit in court, if the plaintiff should die, undoubtedly, the legal representative may be brought on record. I do not see what the principle of that decision has to do with the question which came up for consideration before the learned Subordinate Judge. There is also, in the case of *A. S. Radhakrishna Iyer, In re.* (3), a decision by Mr. Justice Jackson directly to the effect that there is no right in the legal representative of a pauper applicant to continue the application itself for being allowed to sue in *form pauperis*. All that the learned judge in that case stated was that there was no objection to the legal representative being brought on the record because the legal representative might offer to continue the proceedings transforming it into a suit by payment of the requisite court-fee. I see no offer or indication in the present case of any such sort. I am quite conscious that there might be serious difficulties about limitation if a petition for leave to sue in *forma pauperis* should not be allowed to be continued by the legal representative even on payment of the court-fee, the theory being that, if he is allowed to sue in *forma pauperis*, ultimately the date of the presentation of the petition itself is treated as the date of the presentation of the plaint or the institution of the suit. If therefore the respondent had appeared in this case and made any such offer, I should cerainly have been prepared to consider such an offer and have been willing to afford an opportunity by giving time or otherwise to continue the proceedings as a suit. But the respondent not having appeared though served and there being no offer or indication whatever in the petition originally filed by her to take any such steps, I must regard the present petition that was made to the lower court as one to continue the petition on the claim of the right that she is entitled to continue

2. (1924) 48 M. L. J. 390 3. (1924) 21 L. W. 550.

such a pauper petition as the legal representative of the deceased petitioner. Agreeing with the decision of the Calutta High Court in the matter and being satisfied that my decision above referred to has nothing to do with the matter, I am clearly of the opinion that the order of the lower court was made without jurisdiction. I, therefore set it aside. The order of lhe lower court is therefore set aside. I make no order as to costs.

Subbiah *v.* Bala Tripura-sundara Boyamma.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE JACKSON.

K. Venkatarama Ayyar & five others .. *Appellants** (*Petitioners*)

v.

The Official Receiver, Tinnevelly .. *Respondent* (*Respondent*).

Venkatarama Ayyar *v.* The Official Receiver, Tinnevelly.

Provincial Insolvency Act of 1920—*S.* 17—*Debtor—Insolvency petition by—Death after presentation of—Adjudication as insolvent—Jurisdiction of court.*

Under S. 17 of the Provincial Insolvency Act a debtor, who dies after the presentation of the insolvency petition, may be adjudicated an insolvent. The petition having been presented, the words "proceedings in the matter" will include subsequent steps in connection with it, of which the earliest will be the adjudication of the insolvent.

Appeal against the Order of the District Court of Tinnevelly, dated 18th September, 1926, in C.M.P. No. 291 of 1926 in I. P. No. 57 of 1923.

N. Kunjitapadam for Appellants.

R. Krishnaswami Ayyangar for respondents.

The Court delivered the following

JUDGMENT:—In this case the father of the petitioner filed an application for adjudicating himself as an insolvent. The learned District Judge appointed an interim receiver and transferred the petition for disposal to the Official Receiver. Before the petitioner was adjudicated, he died. The Official Receiver later on adjudicated him as an insolvent and asked for orders of the court for administering the estate and orders were passed by the learned District Judge. The petitioners filed an application before the learned Judge contending that

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* C. M. A. No. 377 of 1926. 20th October, 1927.

Venkatarama Ayyar v. The Official Receiver, Tinnevelly.

as their father died before adjudication they were entitled to get his property back free from proceedings in insolvency. The learned District Judge overruled their contention and stated that their objections as regards the actual administration of the property might be brought to the notice of the Official Receiver. In appeal, the same point has been argued before us, namely, that there was no jurisdiction to adjudicate the petitioners' father as an insolvent after his death under the Provincial Insolvency Act. The section applicable to the case is S. 17 of Act V of 1920. It runs thus :

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor."

Before the Act was amended, the section was in the same form except that for the words "so far as may be necessary for the realisation and distribution of the property of the debtor" the words in the section were "as if he were alive". S. 93 of the Presidency Towns Insolvency Act is in the same language as the old S. 10 (corresponding to S. 17) of Act III of 1907. S. 108 of the English Act is also in the same words. It is argued that under S. 17, if a debtor dies after the presentntion of the insolvency petition, he cannot afterwards be adjudicated as an insolvent; and referenee is made in support of the argument to the ommission of the words "as if he were alive" introduced by the amendment. We think that the wording of the Section does not warrant such a conclusion. It states that if a debtor dies the proceedings in the matter shall be continued. The petition having been presented, the words "proceedings in the matter," will include subsequent steps in connection with it, of which the earliest will be the adjudication of the insolvent, without which nothing can be done. In a case reported in *Re Walker*(1), it was held that "proceedings in the matter" would include the adjudication of the insolvent after his death subsequent to the presentation of the application. We think that the alteration of the language in S. 17 is only intended to show clearly the nature of the proceedings, that is, that the proceedings are only for the realisation and distribution of the property. It is not intended to indicate that ajudication is not allowed after the death of the debtor subsequent to the presentation of the insolvency petition. There is no

1. (1886) 54 L. T. 682.

reason why we should assume that the law according to the Provincial Insolvency Act should be understood in a different way from the law according to the Presidency Towns Insolvency Act. If this interpretation is correct, then the learned District Judge's order must be upheld. Whatever objection, the petitioners may have, with regard to the actual administration of the estate, may be put by them before the Official Receiver as indicated in paragraph 4 of the learned Judge's order. We confirm the order of the learned Judge and dismiss the appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH OURT OF JUDICATVRE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

Sonachalam Pillai (dead) and ten others ... *Appellants** (*Defts. Nos 1, 3 to 7, 9, 10, 13 and 14 and supplemental appellant*)

v.

Kumaravelu Chettiar and six others. .. *Respondents* (*Plaintiffs Nos. 1 to 6 and supplemental Respt.*)

Civil Procedure Code, 1908, *S.* 11, *Expl. VI—Representative suit or not—Materials for deciding whether a prior suit was a—Cause-title in prior suit not showing that it was a representative suit—Effect.*

To decide whether the plaintiffs in a prior suit brought it in a representative character or not, the Court must consider whether they did in substance bring it in such a character or capacity. whether the defendants in that suit contested it on the larger question affecting the plaintiffs on record as well as others whom they represented, whether the court in the prior suit understood the plaint and other pleadings therein as covering or as raising the larger issue, and whether it allowed the suit to proceed as being a representative suit. The fact that the cause-title in the prior suit did not describe the suit as being brought in a representative capacity is not conclusive against the view that it was so brought.

Held, on a consideration of the plaint and the judgment in the prior suit, the only available materials, that the plaintiffs in the prior suit brought it in a representative character and that the prior suit was allowed to proceed and was tried and decided as being brought in a representative character within the meaning of Expl. VI to S. 11 of the Civil Procedure Code.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin, dated 17th day of March, 1923, in O. S. No. 2 of 1920.

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* Appeal No. 232 of 1923. 16th November 1927.

Sonachalam Pillai v. Kumaravelu Chettiar.

The Advocate General, T. Nallasivan Pillai and K. S. Sankara Ayyar for Appellants.

T. R. Ramachandra Ayyar, T. L. Venkatarama Ayyar and V. Sambandam Chettiar for Respondents.

The Judgment of the Court was delivered by

Devadoss, J.

Devadoss, J. :—The question whether Explanation VI to S. 11 of the Civil Procedure Code is controlled by O. 1, R. 8, referred to by us to the Full Bench has been answered in the negative and the question of fact whether O. S. No. 14 of 1877 was filed and allowed to proceed in a representative capacity is left for our decision. Mr. Justice Ramesam who delivered the leading judgment* of the Full Bench observes at the close of his judgment.—

"It is still open to the learned Judges to find whether the Subordinate Judge who tried the former suit with reference to the issues, findings etc., meant to allow the suit to proceed in a representative capacity for the benefit of the Vaniyars. As I think there is no express finding and as it is a question of fact, we have nothing to do with the matter. I only observe that it is open to them to so find, if they choose to do so with reference to the pleadings, the issues, judgment and decree."

In our reference we state :

"From the pleadings, from the issue, from the way in which evidence was adduced and the number of witnesses examined and the contentions of the parties appearing in the judgment we have no hesitation in holding that the suit was brought to assert not merely the title of the plaintiffs but also the right of the Vaniyars to enter the Mahamantapam of the temple and the relief asked for was not one personal to the plaintiffs but one which was common to them as well as to all the Vaniyars."

We gave our reason for finding that the former suit was instituted in a representative capacity, and the Judge tried the suit as such and gave his decision thereon. We made the following observation with regard to the contentions of the learned Advocate-General for the appellant that an application under S. 30 must have been presented by the plaintiffs and an order must have been passed and if the order was not forthcoming the court should presume that such an order was passed at least on an oral application and that as all the records have been destroyed under the rules for the destruction of records, every presumption should be made in favour of the regular procedure having been followed.

"We are satisfied that no permission was applied for orally or in writing and that no permission was granted expressly or impliedly under S. 30 corresponding to O. 1, R. 8, Civil Procedure Code, to the plaintiffs to sue on behalf of or for the bene-

* *See* (1927) I. L. R. 51 M. 128 ; 54 M. L. J. 8 for full report of the F. B. Judgment.

fit of all the Vaniyars interested, along with the plaintiffs to worship in the Tiruchendur Temple as alleged by the plaintiffs."

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This observation of ours has evidently given rise to the impression that we did not find as a matter of fact that the suit was brought in a representative capacity. The case as to the representative character of the proceedings was re-argued before us and we are of opinion that the judgment and decree in O. S. No. 14 of 1877 bar the present suit. The plaintiffs sued for themselves and the other members of the Vaniyar community and the suit was defended by the temple authorities on the ground that the whole Vaniyar community had no right of entry as claimed and that the Judge tried and decided the suit as if it was a representative suit. The Subordinate Judge states in paragraph 8 of his judgment :

"It must be conceded by plaintiffs that if the plaint Ex. II in the previous case stood alone, the reliefs asked for in that suit should be deemed to be practically the same as that sought for in this suit."

He gives a correct translation of paragraph 5 of Ex. II and proceeds :

"That prayer will certainly include the present case as the plaintiffs herein are members of the Vaniyar cast and the fact that there was an additional prayer then for the grant of Rs. 52,000 as damages to the plaintiffs therein will not in my opinion alter matters."

We are unable to agree with his view that the Judge at the trial narrowed the issues which followed the pleadings and were general and affected the whole community to issues which were purely personal to the plaintiffs. The statement in the opening passage of the judgment as to plaintiffs and their family is evidently a slip or misprint for community. As regards the statement in paragraph 6 of the judgment it has no bearing on the issues or the form of the suit. What was attempted was to allege that the allegation in plaint did not go far enough and that the Vaniyar community were not Sudras but of a higher caste, namely, Vysias. There is nothing in this to limit the scope of the suit. On the contrary the judgment proceeds to decide the general right claimed of all the Vysias including plaintiffs to enter the portion of the temple to which they were denied access. The issues were not amended, but remained as they were, referring to the general right of all Vaniyars. There is no doubt that this suit was conducted and defended *bona fide* and it is not suggested before us that there was any collusion or any neglect

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by the plaintiffs to adduce evidence in support of the general claim made.

It is strongly urged by Mr. Ramachandra Ayyar that no suit should be considered as having been brought in a representative capacity unless the cause-title makes it plain. In other words, unless the cause-title shows that the suit is brought in a representative capacity, the suit cannot be treated as one brought in a representative capacity. If this argument is correct, then all the cases of the Madras High Court in which such a description was not given in the cause-title and which, notwithstanding the absence of such description, were decided to have been brought in a representative capacity were all wrongly decided. There is no warrant either in law or in the rules of procedure for such a contention. He relies upon the case of *London Association for Protection of Trade* v. *Greenlands, Limited* (1) as supporting his contention and refers to an observation of Lord Atkinson at p. 30. In that case, a firm of merchants who were said to have been defamed by some persons brought a suit against an un-incorprated body of persons for damages and the question was whether the whole body of a loose association which was not incorporated could be made liable for the act of any of its members. In discussing the liability of the whole body of the association Lord Atkinson observed :

> "The main and real tort sued for was the publication on or about April 2, 1910, to one Shand Kydd of a libel contained in a letter addressed to him in the words set out in the third paragraph of the statement of claim. The defendants other than Wilmshurst filed a joint defence. The plaintiffs did not proceed under Order XVI, Rule 9, to sue one or more of the members of the association on behalf of themselves and their brother members. They sued the association in the trade name, the London Association for the protection of Trade, as if it were a legal entity. The very object of this rule 9 was to facilitate the bringing of actions against un-incorporated aggregates of persons. But in order to take advantage of it the fact that the plaintiff or the defendant sues or is sued on behalf of himself and others must be stated in the title to the action".

This observation of Lord Atkinson cannot apply to the present case. That was an action in tort and it cannot be said that the liability of the person who published the libel was the same as the liability of the other members of the un-incorporated body of persons who had had nothing to do with the publication of the libel. Whatever may be the rule of pleading in England, in India the substance of the pleading

1. L.R. (1916) 2 A. C. 15.

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and not the form should be considered. In England, pleading is an art and the principles which apply to English pleadings should not be applied wholesale to pleadings in India without due regard to the circumstances and conditions prevailing here. As observed by Macleod, C.J., in *Dharamdas Kaushalyadas* v. *Ranchhodji Dayabhai* (2),

"It is not the duty of this Court to read pleadings in the District Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. We have a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed".

As I have said above, the substance of the plaintiff's pleadings should be considered and not the mere form. In this connection we may refer to the decision of the Calcutta High Court in *Bidhu Sekhar Banerjee* v. *Kuladaprasad Deghoria* (3). That was a case in which a Shebait was sued by name and the question was whether he was sued in his representative capacity. Fletcher, J., observes after referring to Order 7, Rale 9, Sub-rule 2 :

"The decisions of this Court are quite clear on this point. It is not necessary to state in the cause-title of the plaint the representative capacity in which the plaintiff or the defendant sues or is sued, although no doubt that is a convenient place to make such a statement. In support of that, I may refer to the decision in *Kuarmani Singha Mandhata* v. *Wasif Ali Mursa* (4) and also to the decision in *Dinabhandu Nande* v. *Chamiraddi Miji* (5).

The question whether a suit is brought in a representative capacity or not would only arise when the cause-title does not describe the suit as being brought in a representative capacity. In order to decide the question, we have to see whether the plaintiffs did in substance bring the suit in a representative character or capacity and whether the defendants contested the suit on the larger question affecting the plaintiffs on record as well as others whom they represented, or confined their contest to the plaintiffs' right alone, and whether the Court understood the plaint and other pleadings as covering or as raising the larger issue regarding the right of the plaintiffs as well as other persons having the same interest as the plaintiffs and whether the Court allowed the suit to proceed as being a representative suit and whether the Court confined its decision

2. (1921) I. L. R. 46 Bom. 200, at p. 203.
3. (1919) I. L. R. 46 Cal. 877, at p. 883.
4. (1915) 19 C. W. N. 1193.
5. (1916) 34 I. C. 548.

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only to the plaintiffs' right or whether its decision covered the interest not only of the plaintiffs but also of all persons whom they represented. The materials for the consideration of this question in this case are the plaint and the judgment. The former suit being a suit of 1877, almost all the records connected with it both in the Court of first instance and in the High Court were destroyed under the rules for the destruction of record. But these two documents are sufficient for the purpose of enabling the Court to decide whether the plaintiffs brought the suit in a representative character or not. Ex. II is the plaint. The 1st and 2nd plaintiffs are father and son living in Venkataramapuram village. The 3rd plaintiff does not appear to be a relation but a caste man living in a different village and the 4th plaintiff is a caste man. The 2nd paragraph says :

"The plaintiffs and all the other Vaniars have, from time immemorial, been in the habit of worshipping the deity going as far as the wooden *Ali* (lattice) placed between Ardhamantapam and Mahamantapam in the temple of Sree Subramania Swami at Tiruchendur.. Even in the other temples situated in this Presidency the plaintiffs and others of their caste are in the habit of worshipping the deity going as far as the middle portion situated between Ardhamantapam and Mahamantapam".

In paragraph 3 the plaintiffs state :

"The defendants have been obstructing the entire community of Vaniars, including the plaintiffs from crossing the outside compound and entering in".

Paragraph 4 is

"On account of the aforesaid act and obstruction the plaintiffs and other Vaniars have been lowered in the estimation of the people of other castes of an equal status and are also very much aggrieved at their having to remain without worship in the said temple".

The first prayer as correctly translated by the Subordinate Judge is (1) For establishing the right of the Vaniyar caste including the plaintiffs and others to go as far as the wooden lattice placed between the Ardhamantapam and the Mahamantapam in the Subramania Swami temple at Tiruchendur and to worship the deity from there and to place their Kavadies in front of the Valliamman shrine included in the Prakaram of the said Subramania Swami. (2) For the issue of a permanent injunction to the defendants restraining them from causing obstruction to the plaintiffs and other members of the Vaniyar caste. Unfortunately the written statement is not forthcoming. But the judgment gives a precis of the defendants' written statement. The defendants were the

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Dharmakarthas, Archakas and the temple servants. Paragraph 3 of the judgment is as follows :

"Defendants 3, 4, 5, 7 and 9 urge that plaintiffs are 'Vaniyars' (oil-mongers) and not 'Vaniyars' (merchants), that they are people of low caste, and from immemorial usage the limit prescribed for their worship is the spot C in the plan A and that as they exceeded that limit, they were properly sent out of the temple, and that they have sustained no loss to entitle them to any kind of damages."

The issues are, whether oil-mongers, commonly known as "Vaniyars" are admitted into the plaint temple to worship at the spots A and B and, if so, (2) have plaintiffs suffered in mind and reputation from the defendants having prevented them to make their worship at the said spots and, if they have, to what amount of damages are they entitled ? In the course of the suit the plaintiffs wanted to raise the question whether they are not Vaisyas, that is, one of the twice-born classes, and thereby to make their position unassailable, for, according to their contention, if some Sudras could go and worship by standing in the Mahamantapam, the Vaisyas who are said to belong to the third of the twice-born classes would, as a matter of course, be entitled to at least equal privileges with some of the Sudras. The Subordinate Judge refused to allow the plaintiffs to raise the question whether they are Vaisyas or not, for, as he properly observed, the right to worship by standing at the Mahamantapam rested upon the usage and not upon the plaintiffs being Vaisyas or any other section of the Aryan race. The evidence adduced in the case was to show that the Vaniyars as a class were entitled to worship by going to the Mahamantapam. The summary of the evidence is given in paragraph 12 and from the evidence it is clear that the plaintiffs asserted their right not in their individual capacity as a right belonging to them, but they claimed the right for the whole class or caste of Vaniyars and strove to establish such right in the hope that if that was established they as Vaniyars would have the benefit of it. The evidence of Gurukkal, P. W. 4, was that he had taken a number of Vaniyars on various occasions into the temple. It is clear therefore that the plaintiffs did not rest their case upon any right belonging to them exclusively but they contended for the right of the whole community. The defendants examined 11 witnesses and their evidence was that according to immemorial practice Vaniyars were not allowed to enter the spots A and B and that they made their worship at the spot C. The Subordinate Judge believed the evidence of the defendants as appears from para-

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graph 4 and disbelieved the evidence of the plaintiffs and decided the case against the latter. The plaintiffs carried an appeal to the High Court, and the High Court simply confirmed the decree of the Subordinate Judge with the observation :

"We think the reasons assigned by the Judge who passed the decree dismissing the plaintiffs' suit are satisfactory, to show that the plaintiffs have not made out the right they claimed."

Mr. Ramachandra Aiyar relies upon Ex. II-A, the decree, and urges that the decree does not make any reference to the right of the whole community. The decree as drawn up simply says

"the suit is dismissed and that the parties do bear their respective costs".

From the plaint and the judgment it is clear that the suit was brought by the plaintiffs in a representative capacity and the defendants understood the suit to be such and met the plaintiffs' claim. The first issue shows clearly what was in the mind of the plaintiffs, the defendants and the Judge who framed the issue. The evidence was adduced to show that the whole community has the right claimed in the plaint and the defendants in their evidence met the plaintiffs' case by proving that the class to which the plaintiffs belonged did not enjoy the right claimed and the Judge in allowing the plaintiffs and defendants to adduce such evidence and in considering and weighing the evidence, had before him the larger question whether the plaintiffs' community of Vaniyars had the right claimed or not. That being so, we have no hesitation in holding that the Subordinate Judge who tried the suit not only allowed the suit to proceed in a representative capacity but considered the case and decided it with regard to the question of the right of all the Vaniyars represented by the plaintiffs.

The result of this finding is that the present suit is barred by *res judicata* by reason of the decision in O. S. No. 14 of 1877 on the file of the Subordinate Judge's Court of Tuticorin. The plaintiffs' suit therefore fails and the appeal is allowed and the suit is dismissed with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER.

Sree Rajah Bommadevara Naganna Nayudu Bahadur Zamindar Garu .. *Petitioner* (Presentant)*

v.

Thuraga Pattabhiramayya .. *Respondent (Objector).*

Registration Act, S. 75 (4)—Order of Joint Sub-Registrar under—Revision to High Court against—Maintainability under S. 115, Civil Procedure Code.

Bommadevara Naganna v. Pattabhiramayya.

The Joint Sub-Registrar acting under S. 75 (4) of the Registration Act is not a court subordinate to the High Court within the meaning of S. 115, Civil Procedure Code. He acts merely as if he were a Civil Court.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Registrar, Kistna, dated 17th February, 1926, and passed in Will Enquiry No. 6 of 1925.

L. Venkatanarasayya for Petitioner.

Ch. Raghava Rao and *S. Ramachandran* for Respondent.

The Court delivered the following

JUDGMENT:—I do not think that this Court has any power to interfere. The Joint Sub-Registrar acts under S. 75 (4) of the Indian Registration Act merely as if he were a Civil Court. I do not think that he is a court subordinate to this Court within the meaning of S. 115 of the Code of Civil Procedure.

The petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Perumal Nadar and others .. *Petitioners†.*

Practice—Vakalatnama—Batch of appeals—Consolidation of—Application for permission for—Single vakalatnama by all applicants—Sufficiency of.

Perumal Nadar, *In re.*

When the court allows consolidation of appeals it allows the parties to the appeals to treat the consolidated appeals as one. Hence parties applying for permission to consolidate their appeals may join in one vakalatnama, and one vakalatnama for the batch is sufficient.

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* C. R. P. No. 1013 of 1926. 9th November, 1927.

† S. R. Nos. 16153 etc. of 1927. 9th December, 1927.

Perumal Nadar, *In re.*

Stamp Register (Second Appeals) sought to be preferred against the decree of the District Court of Madura in A. S. Nos. 802, 807, 808, 832, 846, 861, 865, 866, 810, 811, 812, 820, 823, 825, 827, 829, 835, 842, 843, 848, 854, 855, 881, 883 of 1925, 6 of 1926, 804, 833, 834, 847, 849, 857, 858, 860, 862, 867, 868, 869 and 876 of 1925, 434, 435, 437, 440, 441, 445, 446, 447, 453, 454, 455, 456, 457, 460, 461, 462, 463, 464, 468, 470, 473, 474, 475, 478, 480, 481, 482, 483, 484, 485, 486, 487, 488, 491, 492, 493, 494, 495, 497, 499, 500, 504, 505, 506, 507, 508, 509, 624, 625, 626 and 627 of 1925.

Watrap S. Subramania Aiyar for Petitioner.

The Government Pleader (*P. Venkataramana Rao*) for Respondent.

The Court made the following

ORDER :—Mr. Watrap S. Subramania Aiyar appears for the appellants in two batches of second appeals. He has filed two sets of appeals and he asks for permission to consolidate the 38 into one and the 52 into another and also for permission to produce one vakalatnama in each of the batches. As this is a matter which would involve loss of revenue in case the application is granted, I ordered notice to the Government Pleader, and Mr. Venkataramana Rao appears and contends before me that separate vakalatnamas ought to be field even though the court is prepared to allow consolidation of the two batches. The power of this court to consolidate appeals in which the same question is involved and in which there was only one trial and one judgment in the lower court was dealt with by me in a recent case in which the question of paying process fee was considered. In England consolidation of cases or matters is regulated by Order 49, R. 8. The power of the High Court to consolidate appeals is one which is inherent in it and the other High Courts have allowed consolidation in proper cases—*Vide Kashi Prasad Singh* v. *The Secretary of State for India in Council* (1) and *In re "Falls of Ettrick"* (2). *In Veugu Naidu* v. *The Deputy Collcctor of Madura Division* (3), Mr. Justice Phillips allowed consolidation of a number of appeals against awards in land acquisition cases.

The question for consideration now is whether the appellants can be allowed to join in one vakalatnama when presen-

1. (1901) I. L. R. 29 Cal. 140. 2 (1894) I. L. R. 22 Cal. 511.
3. (1916) 34 M. L. J. 179.

ting separate appeals in the hope that the court would consolidate the appeals. In these two batches the trials were only two and there were only two judgments. The appeals arise out of rent suits and the question at issue is common to all the tenants. The landlord is only one person. The contention of Mr. Subramania Ayyar is that when the court allows consolidation it allows the parties to treat the consolidated appeals, whatever the number may be, as one, and, therefore, he is entitled to file in each batch one vakalatnama to which all the appellants in all the appeals are parties. Mr. Venkataramana Rao contends that Article 10, schedule 2 of the Court-fees Act, is against the contention of the petitioner. Article 10 runs as follows :

> *Mukhtarnama or Vakalatnama.* When presented for the conduct of any one case (*a*)—to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate or other executive officer, except such as are mentioned in clauses (*b*) and (*c*) of this number ; eight annas.
>
> (*c*)—to a High Court, Chief Commissioner, Board of Revenue or other Chief controlling Revenue or executive authority ; two Rupees.

and he also draws attention to Rule 31 of the Appellate Side Rules which is as follows :—

> Where a person is a party in two or more connected suits he shall execute a separate Vakalatnama in each case, notwithstanding that he may retain the same pleader in all.

Under Article 10, Schedule 2 of the Court Fees Act, a party who engages a pleader has to give a Vakalatnama in each case. He cannot give one vakalatnama for two cases because he is appellant in both, nor can he give one vakalatnama for several cases because he engages only one legal practitioner in all the cases. But the question is that when the court allows consolidation can the parties to the appeals which are consolidated treat the appeals as one for purposes of vakalatnama as well as for process fees. I have held in C.R.P. Nos. 1517 to 1519 of 1927 that after consolidation the process fee leviable is only on the basis of one appeal. When the court allows consolidation, should it insist upon separate vakalatnama from each party ? I think the very object of consolidation in proper cases is to save the party unnecessary expense and the court unnecessary trouble. I think when the court allows consolidation it allows the parties to the appeals to treat the consolidated appeals as one and, that being so, I fail to see why the parties should not be allowed to join in one vakalatnama when they apply that their appeals should be consolidated.

Perumal Nadar, *In re*,

Article 10, schedule 2 of the Court Fees Act, does not stand in the way of the court consolidating a number of appeals into one and, if, after consolidation, the cases are to be treated as one for purposes of process fees, I do not see why when parties apply for consolidation they should put in separate Vakalatnamas as if they were applying in different appeals. Rule 31 of the Appellate Side Rules does not at all apply to cases in which consolidation is allowed by the court. Brother Wallace, J., in C. M. P. No. 1336 of 1925 ordered consolidation and allowed the appellants to file one vakalatnama. Although this question was not argued before him after notice to the Government Pleader, yet I think his opinion is entitled to considerable weight.

It is urged by Mr. Venkataramana Rao that the decision in *Vengu Naidu* v. *The Deputy Collector of Madura Division* (3) cannot be held to be good in view of the amendment introduced into the Land Acquisition Act in 1921. He refers to Section 26, Clause 2, which says that

> "every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of section 2, clause 2, and section 2, cl. 9, respectively of the Code of Civil Procedure Code, 1908".

I do not see how this could take away the value of decision in *Vengu Naidu* v. *The Deputy Collector of Madura Division* (3). In that case Mr. Justice Phillips allowed consolidation of a number of appeals against awards made by the District Judge and he allowed consolidation in order that the appellants in all the cases may be enabled to pay one court-fee as on the basis of one decree. Mr. K. S. Jayarama Ayyar who appeared in that case was good enough to appear before me and to inform me that, if he had had to pay the court-fee in each case, he would have had to pay a very large sum, but, on account of consolidation the amounts were clubbed together and he had to pay court-fee on the sum total of all the amounts thereby saving a considerable amount of court-fee. If that is the effect of consolidation with regard to court-fee, it is difficult to see why a different principle should apply to vakalatnamas which are powers of attorney authorising a vakil to prepare, file and conduct appeals. When all the appellants to the batch of appeals which are likely to be consolidated join together and execute one vakalatnama, it should not be said that they are executing vakalatnamas in different appeals. If they are engaging

3. (1916) 34 M. L. J. 279.

vakils in different appeals, no doubt, they ought to pay the fee payable on each vakalatnama in respect of each case ; but, when their object is to get all the cases consolidated into one and tried as one case, I think the parties could be allowed by the court to join in one vakalatnama and pay the court-fee on a single vakalatnama.

Mr. Venkataramana Rao also contends that there ought to be separate appeals under Order 41, Rule 1, Civil Procedure Code, which is as follows :

> " Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of decree appealed against and (unless the appellate court dispenses therewith) of the judgment on which it is founded".

and therefore there should be separate memoranda and for such memoranda there must be separate engagements of the pleader. It does not follow that because separate memoranda ought to be filed in such cases that engagements of the pleader should be separate. As the quantum of relief claimed against the tenant in each suit may not be the same and as the quantum of relief granted may not be the same but be different, or, even if they are not different, there being no joint interest, each tenant must file, if he is the appellant, a separate memorandum of appeal, and the landlord, if he is the appellant, should file separate memorandum of appeal. But this has nothing to do with the engagement of the vakil who prepares and files the memoranda. I do not think that Order 41, Rule 1, Civil Procedure Code, in any way conflicts with the principle of consolidation and the consequences that follow from such consolidation. I hold that one vakalatnama in each batch will be sufficient.

The production of one vakelatnama in different cases does not at all obviate the necessity of producing the decree in each case. The appellate Court must know what is the relief granted against the defendant in each case and in order to draft a decree in appeal it is essential that the court should have the decree of the lower court before it and therefore the parties are not relieved of the obligation to produce a properly stamped decree in each of the appeals filed by them. The court may no doubt dispense with the production of the copies of the judgment in all but one as it is a common judgment in all the cases, but the decree is not a common decree, and, when

Perumal Nadar, In re. a decree is appealed against, it ought to be produced along with the memorandum of appeal and it must also be stamped as required by law.

A. S. V. *Office Reference Answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SRINIVASA AIYANGAR.

Narayannan Nair and others ... *Appellants* (Plaintiffs 1 to 5 and 7 to 24)*

v.

Paru Amma and another .. *Respondents (Defendants 1 and 3).*

Narayanan Nair v. Paru Ammal. *Civil Procedure Code, 1908—S. 100—Finding of fact—Interference with—Judgment prior, forming important piece of evidence—Finding arrived at without even adverting to.*

In a suit in which the question was whether one K was, at the time of the suit transanactions, the karnavan or only an anandravan of the plaintiff's tarwad, the lower appellate Court recorded a finding that he was only an anandravan, without even adverting to a judgment (filed as an exhibit in the case) of the District Court pronounced about 35 years before. The parties to the subsequent suit were parties to the suit in which that judgment was pronounced, and it held that K was the karnavan of the plaintiffs' tarwad.

Held that that judgment was a very important piece of evidence and tha the ommission of the lower appellate court even to advert to it vitiated its finding.

Second appeal against the decree of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 55 of 1921 preferred against the decree of the Court of the District Munsif of Manjeri in Original Suit. No. 199 of 1917.

K. P. M. Menon and *P. Govinda Menon* for Appellants.

K. Krishna Menon for 1st respondent.

The Court delivered the following

JUDGMENT :—Plaintiffs 1 to 5 and 7 to 24 are the appellants in this second appeal. They instituted the suit for the recovery of certain property now admitted to be in possession of the 1st defendant. The question whether the plaintiffs would be entitled to recover the porperty or not is, it is now practically clear, dependant on whether one Krishnakutty Nair who was the person from or through whom the 1st defendant ultimately claims was at the time of the transactions the Karnavan of the plaintiffs' tarwad. The whole controversy in this case both in the court

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*S. A. No. 1019 of 1924 8th March, 1927.

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of first instance and in the first appellate court ranged round the question whether or not this Krishnakutty Nair was the karnavan, it apparently being conceded that, if he was the karnavan and the presumption was available to the plaintiffs that the property dealt with by the karnavan was the tarwad property, there was no sufficient evidence on the record to show that it was separate property. No doubt the lower appellate court has recorded a finding, one of fact, that Krishnakutty Nair, at any rate, at the time when the transactions took place, which were the origin of the title of the 1st defendant, was only an Anandravan of the tarwad and not its karnavan. If in arriving at that finding of fact the lower appellate court had adverted at any rate to the more important documentary evidence in the case, there could be no doubt whatever that this court in this second appeal would have no right whatever to interfere. The learned counsel for the appellants has drawn my attention to the fact, and it is really conceded on the other side, that the learned subordinate Judge in the court below has not ever adverted to Ex. GGG which is a judgment of the District Court of Calicut. At that time Mr. R. S. Benson was the District Judge. The judgment is of the year 1892, and to the suit from which the appeal arose in which the said judgment was delivered, all the members of the plaintiffs' tarwad were parties. The present 1st defendant was also a party to the said suit. In the course of the said Judgment the learned judge has in many places referred to this Krishnakutty Nair as the karnavan of the tarwad almost from the year 1851. This is a very important piece of evidence because that judgment was pronounced about 35 years ago, at a time, we may presume, when there was no question really with regard to who was the karnavan of the tarwad at the relevant period. Ex. B in this case had also been marked as Ex. XX in the suit to which that appeal related. In the absence of any reference whatsoever or advertence to this Exhibit GGG in the judgment of the lower appellate court, it seems to me that I cannot possibly regard the conclusion arrived at, albeit on a question of fact, as satisfactory. The learned counsel for the respondents argued that there was such a preponderance of evidence on the record in favour of the view taken by the lower appellate court that the mere fact of an omission to refer to Ex. GGG need not be regarded as sufficient to dislodge

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the judgment of the Subordinate Judge. But it is not possible for me here and now to say whether if the evidence afforded by Ex. GGG had been taken into consideration what weight would have been given to it or how it might have weighed in the balance, having regard to the other evidence in the case. The whole of the other evidence is not before me now. If it were an ordinary piece of evidence, whether oral or documentary, I should certainly have refused to regard the mere omission to refer or to advert to it as sufficient to vitiate the judgment of the lower appellate court. But I cannot shut my eyes at the same time to the fact that the judgment pronounced with regard to the very tarwad in 1892 by the District Court of Calicut must generally speaking be regarded as of great importance and if, as I must suppose, the conclusion arrived at by the lower appellate court had been arrived at without any advertence whatever to such an important document, it seems to me that the judgment must be regarded as vitiated by such a serious omission. I do not for a moment say, or wish to be understood to have said, that the other evidence in the case should be disregarded or even neglected in view of Ex. GGG. That should have been taken into consideration along with the other evidence in the case and due importance given to it. As this has not been done, I think the proper thing to do is to set aside the judgment of the lower appellate court and remand the case to that court for disposal taking into consideration all the evidence in the case inclusive of Ex. GGG.

It must also be recorded in this connection that the question of jurisdiction raised by Mr. Menon on behalf of the appellants has been given up by him. It will not therefore be open to the appellants to argue the question of jurisdiction any longer. The judgment and decree of the lower appellate court are set aside and the case is remanded to the lower appellate court for fresh disposal.

Costs of this second appeal will be reserved and be disposed of by the lower appellate court at the time of the final disposal of the appeal.

A. S. V. *Decree set aside and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Rs. Ar. Ar. Arunachallam Chettiar
by Agent, Valliappa Chettiar ... *Petitioner** (*Plaintiff*)
v.
Namakkal Union Board (Salem District)
by its President S. Sabjan Saib .. *Respondent* (*Deft.*).

Arunachallam Chttdar *v.* Namakkal Union Board.

Madras Local Boards Act (*XIV of* 1920), *Ss.* 93 *and* 228—*Income—Meaning of—Gross income or net income—Assessment on gross income instead of on net income—Suit for refund of excess on the ground that the assessment should be on the net income—Maintainability—Union Board taking legal advice in making the assessment—If a sufficient ground to deprive the assessee of his costs in his suit, when successful.*

The word 'Income' in S. 93 of the Madras Local Boards Act means only the net income and not the gross income.

A suit by a money-lender, who was assessed to profession tax by the Union Board on his gross income, to recover the difference between the amount of assessment and the amount which will be due if the tax was calculated only on his net income is not barred by S. 228 of the Madras Local Boards Act, as it cannot be said that the provisions of the Act have been complied with when the word "income" is treated as meaning gross income and not net income.

A suit in the Civil Court for setting aside an assessment on the ground that the basis of the assessment itself is wrong is not barred by S. 228 of the Madras Local Boards Act.

The fact that a Union Board acted in accordance with legal advice in assessing a person to profession tax on his gross income instead of on his net income is no ground for depriving him of his costs in his suit for refund of the excess amount when his suit is decreed on the finding that the proper basis of the assessment must be on the net income and not on the gross income.

Petition under S. 25, of Act IX. of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Namakkal, dated 30th November, 1925, and made in S. C. S. No. 822 of 1925.

C. A. Seshagiri Sastri for petitioner.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an application to revise the decree of the District Munsif of Namakkal dismissing the suit of the plaintiff for a refund of a portion of the profession tax paid by him to the Union Board of Namakkal. The plaintiff's case is that he, a money lender, was assessed on the gross income for the year and that he is liable to pay profession tax only on the net income and that he is entitled to be paid back the amount which was collected in excess of the amount which he was liable in law to pay. The Union Board raised

*C. R. P. No. 630 of 1926. 25th November, 1927.

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several pleas to the suit one of which was as regards the jurisdiction of the court to entertain such a suit and the second was that the defendant was justified in taking the gross income as the basis for assessing profession tax. The District Munsif held that under the Local Boards Act the gross income was the basis of taxation and that the court had therefore no jurisdiction to entertain the suit.

The main contention of Mr. Seshagiri Sastri for the petitioner is that the expression "professional income" in S. 93 of the Local Boards Act means only the net income and not the gross income of the petitioner. The petitioner is a money lender who carries on money lending business not only with his own money but with borrowed capital and the net income therefore would be the gross income minus the charges incurred in carrying on the business and the interest that he has to pay on the borrowed capital. The word 'income' is not defined in the Act. In S. 93 the expression used is "professional income." In assessing a person to profession tax the President of the Board is given the power under Schedule 4, rule 9, of classifying the persons liable to profession tax and in the classification the income is taken as the basis. Class 1 consists of persons whose income is not less than Rs. 2,000 per mensem and there is gradation of the classification going down to not less than Rs. 25 per mensem. This classification shows that a person is to be assessed on the income actually earned by him. It is suggested by Mr. T. M. Krishnaswami Aiyar that the profession tax is levied for the purpose of carrying on the profession and therefore a person who carries on a profession is bound to pay the tax. But this argument overlooks the fact that profession tax is not levied on the basis of the income derived by a person from the profession. When income is the basis of taxation, what actually benefits the person can be called income, and not everything that comes into the business but what accrues to his benefit, that is to say, the gross income, minus the legitimate charges, would be the income of the person. It has also to be noted that in the case of companies, in rule 8 the expression "gross income" is used. When the legislature uses the expression "gross income" in one rule and uses the word income in another rule, the court construing the Act must give the expressions the meanings which they are intended to convey in the context. I am unable to accept the contention of Mr. Krishnaswami Ayyar that the word 'income' as used in the Act could only mean gross income. If that was so, then I fail to see why in rule 8 the word 'gross' should have been used in front of the

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word 'income'. This shows that the legislature made a distinction between gross income and income as such and as I have observed income could only mean in the ordinary sense, income which really benefits a person and not the gross earnings or gross takings of which only a fraction may really benefit a person. Even if there were no authorities I should be inclined to hold that the word income as used in the Local Boards Act could only mean net income for the purposes of taxation under rule 9.

The question as to the meaning of the word income arose so far back as 1900 in a case *Subramaniam* v. *The President, Municipal Commission, Madras* (1), stated by the Presidency Magistrate for the opinion of the High Court. Shephard and Boddam, JJ., held that they were of opinion that it was the net income which should be considered. No reasons are given for the opinion although it appears from the report that the point was argued by very able counsel. But in a later judgment of this court reported in *Municipal Council of Mangalore* v. *The Cordial Bail Press, Mangalore* (2), this point was fully discussed. There the question was as to the meaning of the word income used in Sch. A of the District Municipalities Act of 1884. Sir Subramania Aiyar, O. C. J., and Bhashyam Aiyangar, J., held that the word income meant net income. They relied upon *Lawless* v. *Sullivan* (3) for their view that income meant net income. The Privy Council in that case observed;

"The question is whether the word "income" in the enactment to be construed is to be understood in a different and what, for the purpose of taxation would be a more onerous sense".

After adverting to various provisions of the Act their Lordships observe that

"there is nothing in the enactment imposing the tax nor in the context which should induce them to construe the word "income" when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss".

In that case a banking concern was assessed to profession tax on the gross income. The learned Judges who decided *Municipal Council of Mangalore* v. *The Cordial Bail Press, Mangalore* (2) observe at page 550 :

"We find nothing in the context in the schedule A (to the District Municipalities Act), or in any other part of the Act, which would lead to the conclusion that the word "income" is there used in the 'more' onerous sense' as contended for on behalf of the Municipality or otherwise than in its 'natural and commonly accepetd sense' as denoting the profits or net income derived from the business".

1 (1913) M W N 935. 2. (1903) I L R 27 M 547 : 14 M L J 410 (P C). 3. (1881) L R 6 A C 373, at p. 375 (P C).

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There is no other case on the point. Mr. Krishnaswami Aiyar relies upon a recent decision of this court in C. R. P. No. 294 of 1925, in support of the contention that unless there was in the decision of the Board anything contrary to natural justice or a violation of the rules which are to govern its procedure, a Civil Court has no jurisdiction to question the order of the Board. In that case Odgers and Jackson, JJ., held that the Board did not contravene any of the provisions of the Act or the rules under which the Board had to act. Here the question is not whether the Board contravened any of the provisions of the Act but whether their basis of taxation is correct or not correct. Where the basis of taxation itself is challenged I think the Civil Court has power to consider whether the basis relied upon by the Board is the correct one or not. The question of jurisdiction was raised in *Municipal Council of Mangalore* v. *The Cordial Bail Press, Mangalore* (2) and reliance was placed upon S. 262, sub-section 2 of the District Municipalities Act. It was held the Civil Court had jurisdiction to try the suit. The corresponding provision in this Act is S. 228 which is as follows :

"No suit shall be brought in any court to recover any sum of money collected under the authority of this Act, or to recover damages on account of any assessment or collection of money made under the said authority provided that the provisions of this Act have been in substance and effect complied with".

It cannot be said that the provisions of the Act have been complied with when the word "income" is treated as meaning gross income and not net income. As I said when the basis of assessment is in question, the Civil Court can entertain a suit for setting aside the assessment on the ground that the basis of assessment itself is wrong and S. 228 (2) does not bar such a suit. S. 93 of the present Act is almost word for word for S. 93 of the District Municipalities Act of 1920, and the provisions of that section are the same as the provisions in the District Municipalities Act of 1884 with regard to profession tax. I therefore hold that the word 'income' in S. 93 of the Local Boards Act is net income and not gross income.

The question as to whether the case should be sent down or not will be considered after Mr. Krishnaswami Aiyar ascertains from the Board whether the Board will reconsider its decision in view of the decision of this court. If the Board would agree to revise the assessment, in the light of my decision, it would not

2. (1903) I L R 27 M 547 : 14 M L J 410 (P C).

be necessary to send the case back to the District Munsif for trial.

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The question of costs will be considered later on.

Adjourned for two weeks.

This petition coming on again for further hearing, the Court delivered the following

JUDGMENT :—Mr. T. M. Krishnaswami Aiyar says that the petitioner, Mr. Seshagiri Sastri's client, has been assessed on the net income at Rs. 6 for the half year in question in accordance with the view expressed in my judgment. The matter having been settled between the parties it is unnecessary to send the case back for a trial by the District Munsif.

As regards the question of costs, Mr. Krishnaswami Aiyar urges that there was no decision on the point and the Union Board acted in accordance with the legal advice which it received. I do not think that would be a ground for depriving the petitioner of his costs. The ordinary rule is that costs should follow the event unless there is some ground, which would be sufficient to deprive the successful party of his costs. I do not think in this case the petitioner has done anything to disentitle him to the costs of this litigation. I therefore allow the petition and direct that a decree be passed in favour of the petitioner for Rs. 74, that is, Rs. 80, which he has paid, minus Rs. 6 at which he has been assessed and which he is bound to pay. He will be entitled to the costs of this petition and costs in the lower court.

N. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

T. R. Srinivasa Row .. *Petitioner* (Accused in C. C. No. 122 of 1926 on the file of the Court of the Joint Magistrate of Chingleput).*

Srinivasa Row, *In re*

Criminal Trail—Confession—Part against the accused and part in his favour—Basing conviction on—Propriety—Evidence Act, S. 114—Sub-Postmaster—Failure to account for shortage in monies—Presumption of dishonesty.

If an accused is to be convicted on his confession, it must be taken as a whole, and it would be unsafe to use the part against him and discredit the part in his favour.

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*Crl. R. C. No. 555 of 1927. (Crl. R. P. No. 494 of 1927). 18th November, 1927.

Srinivasa Row, In re.

Where a Sub-Postmaster is not able to account for a shortage in the post office monies, there is no conclusive presumption of dishonesty or even any legitimate presumption under S. 114 of the Evidence Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the Chingleput Division, dated 23rd April, 1927, in Criminal Appeal No. 7 of 1927, preferred against the order of the Court of the Joint Magistrate of Chingleput in C. C. No. 122 of 1926.

V. L. Ethiraj and *A. Rangaswami Aiyangar* for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—In this case the petitioner who is a Sub-Postmaster was convicted of temporary misappropriation of a sum of Rs. 60. The charge against him is that he misappropriated three sums of 6 annas, Rs. 58-11-0 and Rs. 113-5-0. The Joint Magistrate found that the charge was not proved as regards 6 annas and Rs. 58-11-0. As regards Rs. 113-5-0 he found that the charge was proved. On appeal the Sessions Judge was of opinion that misappropriation at least to the extent of Rs. 60 was proved and confirmed the sentence.

The chief evidence on which the accused has been convicted is his confession contained in Exhibit B that Rs. 91-15-6 was short. He goes on to say that he was in bad health for sometime, that he was not verifying the accounts and cannot explain how the shortage came. There is no evidence that the statement as to his ill-health is not true. If accused is to be convicted on his confession it must be taken as a whole and it would be unsafe to use the part against him and discredit the part in his favour. I need only refer to *Pika Bewa* v. *Emperor* (1) and *Wafadar Khan* v. *Queen Empress* (2). Apart from Exhibit B, there is no evidence that the accused misappropriated the money.

In a case somewhat similar to the present one where a Secretary to a Co-operative Society was not able to account for Rs. 100, it was held by Jackson, J., that there was "no conclusive presumption of dishonesty or indeed any legitimate presumption under S. 114 of the Indian Evidence Act".

I do not think Exhibit B can be made a safe ground for a conviction under S. 409 of the Indian Penal Code.

1. (1912) I L R 39 C 855. 2. (1894) I L R 21 C 955.

I reverse the conviction and sentence and direct that the fine, if paid, be refunded. Srinivasa Row, *In re.*

N. S. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Calcutta.]

PRESENT :—LORD SINHA, MR. AMEER ALI, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Abdur Rahim and others ... *Appellants* (Plaintiffs)*

v.

Syed Abu Mahomed Barkat Ali Shah, since deceased, and others ... *Respondents (Defts.)*

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Civil Procedure Code (1908), *S.* 11, *Explanation VI—S.* 92—*Interpretation of Statutes— Previous state of the law—Intention to abolish substantive rights—Provisions of S.* 92, *Civil Procedure Code, mandatory—Suit not claiming any relief specified in sub-section* (1) *of S.* 92—"*Such further or other relief*" *in clause* (*h*) *of S* 92 (1), *construed* ejusdem generis—*Relief against third parties,* i. e., *strangers to the trust—Prayer for declaration that the property is* wakf—*Rule of* res judicata *in representative suits—Compromise decree—Amendment of plaint without Advocate-General's sanction, effect of.*

It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may be founded ; but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended.†

In an enactment dealing merely with procedure (as, for instance, the Code of Civil Procedure), an intention to cut down or abolish existing substantive rights must be clear and manifest, and will not be lightly inferred.

The Legislature has not enacted that *all* suits founded upon any breach of trust for public purposes of a charitable or religious nature, *irrespective of the relief sought,* must be brought in accordance with the

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*P. C. Appeal No. 56 of 1925. 2nd December, 1927.

†Compare the judgment of Lord Sinha in *Mussamat Ramanandi Kuer* v. *Mussamat Kalawati Kuer,* (1927) L R 55 I A 18 : 54 M L J 281 (P. C.), decided by the Privy Council on the 11th November, 1927, where it was held that where there is a possitive enactment of the Indian Legislature the proper course is to examine the language of that statute and to asertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law, or of the English law upon which it may be founded.—K. J. R.

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provisions of S. 92, Civil Procedure Code. On the contrary, the intention of the Legislature clearly was that only suits claiming any of the reliefs specified in sub-section (1) should be instituted in conformity with the provisions of S. 92, sub-section (1).

Under the Code of Civil Procedure, 1877, as well as the Code of 1882, the question had arisen whether S. 539 was mandatory and therefore all suits *claiming any relief mentioned in S.* 539 should be brought as required by that section or whether the remedy provided by S. 539 was in addition to any other remedy that existed under the law for the redress of any wrongful action in connection with a public trust of a charitable or religious nature. Such rights, when claimed on behalf of the public or any section thereof, had been held to be capable of enforcement by a suit under S. 30 of those Codes (now replaced by Order 1, Rule 8) ; and it had also been held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature, as above mentioned. Great divergence of opinion had arisen in India in this connection ; and sub-section (2) of S. 92 was enacted by the Code of 1908 to put an end to this difference of opinion. It accepted and enacted the view which had been taken by the Bombay High Court,* as opposed to the view taken by the other High Courts generally, viz., that a suit *which prayed for any of the reliefs mentioned in S.* 92 could only be instituted in accordance with the provisions of that section.

The contention that the words "such further or other relief as the nature of the case may require" [in clause (*h*) of S. 92, sub-section (1)] must be taken, not in connection with the previous clauses (*a*) to (*g*), but in connection with the nature of the suit, viz., *any* relief other than (*a*) to (*g*) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case, was rejected by the Privy Council, and their Lordships held that these words, 'further or other relief' must on general principles of construction be taken to mean relief of the same nature as clauses (*a*) to (*g*).

S. 92 was not intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, *i.e.*, strangers to the trust. "They (the Privy Council) are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in clause (*h*) under the general words 'further or other relief'".

In a suit brought under S. 92, a prayer for a declaration that the property in suit is *wakf* property and not the personal property of the defendants, is a prayer for relief not covered by the section.

Quaere, whether the *broad* proposition enunciated in *Jenkins* v. *Robertson*, (1867) L R 1 H L Sc. 117, as explained by Vaughan Williams, J., in *Re South American and Mexican Co.*, L R (1895) 1 Ch. 37, at pp. 45

*See for instance *Tricumdass Mulji* v. *Khimji Vallabhadass*, (1892) I L R 16 B 626, and *Sayad Husseinmian Dadumian* v. *Collector of Kaira*, (1895) I L R 21 B 48.—K. J. R.

and 46, namely, that "persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against them on contest would bind the public", is applicable in India to suits of a representative character falling within the purview of the Civil Procedure Code, 1908, S. 92, as read in the light of S. 11, Explanation VI of that Code.

Where a plaint in a suit brought under S. 92, Civil Procedure Code, 1908, with the sanction of the Advocate-General, is subsequently amended, *e.g.*, by adding strangers to the trust as defendants and by prayers for relief not covered by S. 92, such amendments change the nature of the suit which thereupon ceases to be one of a representative character. *

Alterations made by S. 92 of the Code of 1908, pointed out.

Appeal (No. 56 of 1925) from a judgment and decree of the High Court, Calcutta (Newbould and Ghose, JJ.), dated the 4th February, 1924, reversing a judgment and decree of the Subordinate Judge of the 24 Parganas, dated the 8th July, 1921.

The material facts of the case are given in their Lordships' judgment, and also in that of the High Court, reported in *Abu Mahomed Barkat Ali* v. *Abdur Rahim* (1).

De Gruyther, K. C., and *Abdul Majid* for appellants.

Lowndes, K. C., and *Dube* for respondents.

The judgment of their Lordships was delivered by

Lord Sinha.

LORD SINHA.—This litigation arises in connection with an ancient mosque standing on a portion of Holding No. 221 in the Government Khas Mehal of Dihi Panchannagram, near Calcutta. In a proceeding under Reg. II of 1819 between the Government of India as plaintiff and one Syed Miron Munshi of Kalinga as defendant, the whole holding, then 3 bighas 11 cottas and 3 chhataks in area (a portion has since been acquired under the Land Acquisition Act), was declared by the Revenue Authorities to be revenue-free as property dedicated long ago to religious uses, *i. e.*, a wakf, of which the said Miron Munshi was the then mutwali. The mosque stood on a portion of this area and the rest of it was let out to tenants, the rents being appropriated for the expenses of the mosque.

Mir Miran or Miron Munshi continued to hold this area of land as mutwali of the mosque until his death about 70 years ago, and after him his son, Sheikh Mahommad Jan, succeeded

*In the above case, no sanction of the Advocate-General was obtained for these amendments. *Quaere*, whether their Lordships' decision (as to the representative nature of the suit) would have been different even if such sanction had been obtained.—*K. J. R.*

1. (1924) 80 I C 44.

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him as mutwali. Mahommad Jan died about 50 years ago, and thereafter his widow, Rukia Bibi, assumed the office of mutwali. On the 27th October, 1902, she executed a deed whereby she purported to nominate her son Mir Ramjan Ali as her successor in the mutwaliship.

Disputes having arisen, the heirs of Mahommad Jan instituted in 1907 a Suit No. 78 of 1907 in the Court of the Subordinate Judge of 24 Parganas, on the basis that Holding No. 221 was the secular property of Mahommad Jan and asking for partition thereof. A preliminary decree for partition was actually made in that Suit in 1908. On the 18th July, 1910, a Suit No. 48 of 1910 was filed in the Court of the District Judge of 24 Parganas with the sanction of the Advocate-General under S. 92 of the Code of Civil Procedure of 1908 by seven Mahommedans as plaintiffs against Rukia Bibi as defendant. It was sought by that suit to obtain the removal of Rukia Bibi from the office of mutwali, for accounts and for settling a scheme for the management of the said properties. The plaint in that suit was subsequently amended on the 15th December, 1910 :—

(1) By the addition of all the heirs of Mahommad Jan as defendants, who, it was alleged, were claiming the property as their personal property; and

(2) by adding a prayer for the declaration that the property in suit was wakf property and not the personal property of the defendants.

No sanction of the Advocate-General was obtained for these amendments, and apparently the Advocate-General had nothing further to do with that suit at any later stage.

On the 15th September, 1911, a petition of compromise was filed in that suit on behalf of plaintiffs 1, 2, 3, 4, 5, and 7 (*i. e.*, all the plaintiffs except plaintiff No. 6, named Rahimbuksh). The first two paragraphs of the petition were as follows:—

"That your petitioners have on consideration of all the circumstances and facts as disclosed in the evidence produced in the case and which the parties may produce on their behalf have decided that it would be to their best interest and in the interest of public for whose benefit the plaintiffs brought this suit to compromise the suit on the following terms and conditions:—

"That out of the disputed property the portions shown in the plan herewith, filed and marked A, B, C, D, measuring 1 bigha 1 cotta 8 chhattaks, 24 sq. ft. (1 bigha 1 cotta 8 chhattaks and 24 square feet) should be declared a valid Mahamedan public religious and charitable endowment, a wakf."

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The rest of the petition dealt with the appointment of new mutwalis and the future succession to the mutwaliship. On the 16th of September, 1911, the following order was passed on the petition by the District Judge:—

"The compromise has now been accepted by all parties to the suit. The terms are set out in the petition filed by the plaintiffs on the 15th September, to which a plan is attached. My previous order of 5th September refers to a petition filed on behalf of ten defendants.

"A permission (petition ?) has now been filed on behalf of the remaining three defendants.

"Let a decree be drawn up in terms of the petition—a copy of the plan above referred to will form a part of the decree.

"No order is made as to costs."

It would appear that the District Judge's attention was not drawn to the fact that one of the plaintiffs was not a party to the compromise, nor is there anything on the present record to show that the learned Judge's attention was drawn to the nature of the suit as affecting a public religious trust. A decree was drawn upon the compromise petition on the 16th September, 1911. The effect of the consent decree was to declare by implication that, with the exception of 1 bigha 1 cotta 8 chhattaks 24 square feet, which was admitted to be wakf, the rest of the holding amounting to 2 bighas 9 cottas 10 chhattaks and 16 square feet, was secular property and as such belonged to the heirs of Mir Mahommad Jan, who had been added as party defendants by the amendment of the plaint.

Thereafter these heirs alienated most of the latter part of the property, and the present suit was brought on the 2nd March, 1918, by five Mahommedans of the neighbourhood against the heirs of Mahommad Jan and their alienees, as also the original plaintiffs in Suit No. 48 of 1910 or their representatives. They alleged that the partition decree in Suit No. 78 of 1907, as well as the compromise decree in Suit No. 48 of 1910, were not binding upon them, and they also prayed that the whole of the then area of 3 bighas 8 cottas 3 chhattaks "may be declared wakf property and the defendants restrained from obtaining possession either directly or by realising rents of the said lands."

The defence in substance was (1) that the lands in suit were not wakf; (2) that the suit was not maintainable by virtue of S. 92, sub-section 1, as no sanction of the Advocate-General had been obtained and the suit was not instituted in the District Judge's Court, and (3) that the plaintiffs were barred by the rule of *res judicata*.

By his judgment, dated 8th July, 1921, the Subordinate Judge held that the whole of the holding was wakf and that the

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plaintiffs as worshippers in the mosque were entitled to maintain the suit in that Court without the sanction of the Advocate-General, and that the compromise decree in Suit No. 48 of 1910 was without jurisdiction and not binding upon them, and he accordingly passed a decree in favour of the plaintiffs.

The High Court on appeal set aside the judgment of the Subordinate Judge. They entertained considerable doubt as to the maintainability of such a suit as this without the sanction of the Advocate-General under S. 92 of the Code of Civil Procedure, having regard to sub-section (2), which has been added to the corresponding S. 539 of the old Code of Civil Procedure, but they considered it unnecessary to decide the point, as they were of opinion that the plaintiffs were bound by the rule of *res judicata* and the suit should be dismissed on that ground.

Two questions only have been argued before this Board. The first is whether the suit is maintainable in view of the provisions of sub-section (2) of S. 92 of the Code of Civil Procedure, 1908; and the second is whether the suit is barred by the rule of *res judicata* under Explanation VI, S. 11, Civil Procedure Code.

It is urged broadly on behalf of the respondents that *all* suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of S. 92, Civil Procedure Code.

The short answer to that argument is that the Legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in sub-section (1) shall be instituted in conformity with the provisions of S. 92, sub-section (1).

The reliefs specified in sub-section (1) (*a*) to (*h*) do not cover any of the reliefs claimed in this suit unless the words "further or other relief" in clause (*h*) can be held to cover them. It is argued that the words "such further or other relief as the nature of the case may require" must be taken, not in connection with the previous clauses (*a*) to (*g*), but in connection with the nature of the suit, viz., any relief other than (*a*) to (*g*) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case. Their Lordships are unable to accept this argument. First, because the words "further or other relief" must on general principles of construction be taken to mean

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relief of the same nature as clauses (a) to (g). Secondly because such construction would cut down substantive rights which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time.

It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law upon which it may be founded; but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended. For this reason it becomes necessary to consider how the law stood prior to the enactment of S. 92 of the Code of Civil Procedure of 1908.

The first Code of Civil Procedure, Act VIII of 1859, contained no section specially relating to the administration of public trusts of a religious or charitable nature. The Code of 1877 for the first time introduced such a special section, viz., S. 539, where particular reliefs only were sought in such cases. This was re-enacted in the Code of 1882.

S. 92 takes the place of what was S. 539 in the Code of 1882, as well as the Code of 1877, with certain changes, the most material of which are as follows:—

(a) In the Relief Clauses under sub-section (1), clauses (a) and (d), which did not appear in the Codes of 1877 and 1882, are inserted.

(b) Sub-section (2) is altogether new.

As regards clauses (a) and (d), it appears that there had been some divergence of opinion as to whether S. 539 authorised the removal of a trustee or the directing of accounts and inquiries. Most of the High Courts held that the power to appoint a new trustee necessarily involved the power to remove an old trustee. *But the Madras High Court held to the contrary. The Legislature in 1908 adopted the former view, and inserted clause (a) expressly giving power to remove a trustee, in addition to the power to appoint new trustees [now clause (b)].

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* See *Rangasami Naickan* v. *Varadappa Naickan,* (1894) I L R 17 M 462 (F. B.)

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Accounts and inquiries, though not expressly mentioned in the relief clauses, had been held by some of the Courts to be necessarily incidental to the power to remove an old trustee and appoint * a new one. That power was expressly inserted by the present clause (*d*). But the most important change was made by sub-section (2) of S. 92.

Under the Code of 1877, as well as the Code of 1882, the question had arisen whether S. 539 was mandatory and therefore all suits *claiming any relief mentioned in S.* 539 should be brought as required by that section or whether the remedy provided by S. 539 was in addition to any other remedy that existed under the law for the redress of any wrongful action in connection with a public trust of a charitable or religious nature. Such rights, when claimed on behalf of the public or any section thereof, had been held to be capable of enforcement by a suit under S. 30 of those Codes (now replaced by Order 1, Rule 8); and it had also been held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature, as above mentioned. Great divergence of opinion had arisen in India in this connection, not merely as between the different High Courts, but between different Benches of the same Court. The resulting uncertainty could only be removed by legislative enactment, and sub-section (2) of S. 92 was enacted to put an end to this difference of opinion. It accepted and enacted the view which had been taken by the Bombay High Court, as opposed to the view taken by the other High Courts generally, viz., that a suit *which prayed for any of the reliefs mentioned in S.* 92 could only be instituted in accordance with the provisions of that section. The words used in sub-section (2) are appropriate and sufficient if that was the purpose, but they are insufficient and inadequate if it was intended to make a complete change such as is suggested on behalf of the respondents.

Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, *i. e.*, strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such

*See *Sayad Hussainmian Dadumian* v. *Collector of Kaira*, (1895) I L R 21 B. 48.

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third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in clause (*h*) under the general words "further or other relief."

The conclusion is that, inasmuch as the suit out of which this appeal arises did not claim any such relief as is specified in sub-section (1) of S. 92, that section was no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge.

The only other question is whether the suit is barred by the rule of *res judicata, i.e.,* whether the compromise decree of the 15th September, 1911, in Suit No. 48 of 1910 precludes the present plaintiffs from bringing this suit. It is said that the previous Suit No. 48 of 1910 was instituted under the provisions of S. 92 with the sanction of the Advocate-General, and therefore became a representative suit and the decree in that suit, *whether by adjudication of the Court or by consent of parties,* is binding upon that section of the public which was represented by the plaintiffs in that suit, and therefore upon the plaintiffs in the present suit by virtue of Explanation VI of S. 11 of the Code.

The learned Judges of the High Court were of opinion that the consent decree of 1911 could not be questioned on the grounds stated by the Subordinate Judge, as there was no want of jurisdiction of the Judge to entertain the suit, or to order the amendment as prayed for, or to direct a decree to be made on compromise of the suit.

Their Lordships are unable to concur in this view. It is extremely doubtful whether a decree passed under the circumstances of this case can be held to be *res judicata* as against any persons other than those who consented to that decree.

The case of *Jenkins* v. *Robertson* (2) was based on Scottish Law and as explained in the case of *In re South American and Mexican Co.* (3) appears to lay down broadly that persons instituting a suit on behalf of the public have no right to bind the public by a compromise decree, though a decree passed against them on contest would bind the public. It is not necessary for the purpose of this case to decide whether the law in India under S. 11 of the Code of Civil Procedure is the same as so explained. Their Lordships consider that, in so far as the nature of the suit was

2. (1867) L R 1 H L Sc 117. 3. L R (1895) 1 Ch. D 37

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changed by the amendments mentioned, viz., by adding strangers to the trust as defendants and by prayers for relief not covered by S 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, viz., by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Explanation VI, has no application to such a case.

On both grounds, therefore, the arguments for the respondents fail, and their Lordships will humbly advise His Majesty that the decree of the High Court be set aside and the judgment and decree of the Subordinate Judge restored, with costs of the High Court appeal and the costs of this appeal.

Solicitors for appellants : *W. W. Box & Co.*

Solicitors for respondents : *Watkins and Hunter.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Srinivasaraghavachariar ... *Appellant* (2nd respondent in S. A. No.* 1548 *of* 1922—59*th defendant*).

v.

E. Rajagopalachariar ... *Respondent (Appellant in do.—Plaintiff*).

Srinivasaraghavachariar v. Rajagopalachariar.

Hindu Law—Daughter—Mortgage of property inherited from father—Necessity—Marriage of her son, if a—Reversioner bringing about transaction and attesting mortgage deed—Right to dispute its validity—Estoppel.

A Hindu daughter, who had inherited her father's property, mortgaged that property for raising money for her son's marriage. The mortgage was brought about actually by the plaintiff himself who, together with his brothers, the reversioners, attested the mortgage deed. The evidence showed that the estate of the woman's husband at the time was non-existent and that unless the money was raised by that mortgage there was no other way of obtaining it.

Held that the plaintiff was estopped from contending that the mortgage was not for a purpose which would make it binding on the reversioners.

Quaere : whether the marriage of the son would, under the Hindu Law, be a purpose binding on the estate.

Per Srinivasa Aiyangar, J.:—The mention in the deed of alienation by a Hindu limited owner of a purpose which in law would not support an

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*L. P. A. No. 161 of 1925. 16th November, 1926.

alienation by her would not by itself render the alienation invalid against a reversioner who brought about the transaction himself and attested the deed of alienation.

Srinivasaraghavachariar v. Rajagopalachariar.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Devadoss, dated 1st May, 1925, in Second Appeal No. 1548 of 1922 [reported in *Rajagopalachariar* v. *Sami Reddi* (1)], preferred to the High Court against the decree of the District Court of Chingleput in A. S. Nos. 295 and 296 of 1920 presented against the decree of the Court of the Subordinate Judge of Chingleput in O. S. No. 7 of 1919 (O. S. No. 57 of 1918, District Court, Chingleput).

A. Viswanatha Aiyar for appellant.

K. Bashyam Aiyangar for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—The position here is that money was borrowed by a woman called Alamelu Ammal who had a limited estate in her deceased father's property to enable her to marry one of her sons, the 3rd defendant in this case. She raised that money by a mortgage and the mortgage was brought about actually by this plaintiff himself who together with his other brothers, the reversioners, had attested the document. There was plenty of evidence in this case that the husband's estate at the time was non-existent and that unless this mortgage was obtained in this way there was no other way of obtaining it. It is said that the Hindu Law does not recognise the purpose of marrying a son as one that can result in a debt binding on the estate. I prefer to avoid the use of *quasi* metaphorical expression like 'necessity' which of course can only be true as applied to matters of this kind in a hyperbolical sense. The doctrine laid down by the Privy Council has been analysed by the learned Judge and indeed by the learned District Judge who wrote a very careful and learned judgment on the subject; and the result of it all is that there is a great conflict in the authorities which I do not propose to attempt to resolve for the purpose of this case as to whether procuring such a marriage is binding on the estate or not. There is authority both ways not only all over India but in this very Presidency itself. In these circumstances my own view is that when the reversioner put himself forward to bring this about the lender was entitled to assume that the reversioner was ready to guarantee that the debt was one which would be binding on the reversioner of the estate in his hands. That being so, I do not feel myself called upon to

1. (1925) 50 M L. J 221.

Srinivasaraghavachariar v. Rajagopalachariar

Srinivasa Aiyangar, J.

resolve the main question, as I might otherwise have, did this question of representation and estoppel not arise, and I am content to rest on that narrow ground. The Letters Patent Appeal must be allowed and the judgment of the District Judge restored.

Srinivasa Aiyangar, J. :—I agree but I would only add that the learned Judge from whose judgment this Letters Patent Appeal has been preferred seems to have thought that, if as a matter of law at any particular time it was clear that the purpose for which an alienation was purported to be made was regarded as not being proper to support an alienation and if such purpose should appear in the instrument, the alienation should not be supported even against a person who brought about the transaction himself and attested the instrument of alienation. He must be a bold man who would undertake to say that at any time any question at any rate with regard to the Hindu Law relating to alienation is so perfectly clear as to be obvious to any person whatsoever. After all it must be remembered that most of these questions are mixed questions of law and fact and the law has therefore provided that alienations will be binding on the estate not only as may be shown to have been for necessary or proper purposes but also as may be shown to have been obtained after a *bona fide* inquiry with regard to the purpose of the alienation. In the latter case, if there is a *bona fide* inquiry made by the alienee with regard to the alienation and all the persons, especially the presumptive reversioners interested in the estate, consent to the alienation and also otherwise concur in it, then it follows that, apart altogether from the purpose of the alienation, the alienee would have satisfied the requirement which will support the alienation. That is the reason why as a matter of common practice at any rate in South India every alienee of property from a qualified owner has been, it seems to me, almost from time immemorial insisting upon making inquiries as to the purpose of the alienation from the presumptive reversioners and insisting also in many cases in getting reversioners in proof of their approval of the alienation to attest the deed. If the mere mention of the purpose in the document should be regarded as sufficient to whittle down the effect of such inquiry and the effect of such attestation, I am satisfied that no alienee could possibly be safe and there is really no purpose served by providing that a *bona fide* transferee after making inquiries will be protected; in this case the learned Judge has referred to a case of a gambling debt being required to be paid off by a father and has put

Srinivasaraghavachariar v. Rajagopalachariar. — Srinivasa Aiyangar, J.

to himself the question whether in such circumstances even though the immediate heirs or reversioners should consent to the alienation the heir or reversioner should be bound. But it cannot possibly be found that the question of the marriage of a son and the payment of a gambling debt are at all analogous or in *pari materia*. It seems to me that, having regard to the difficulty of deciding in each case on the facts and under the law applicable whether the particular purpose for which the alienation is sought to be made would be proper or not, the law has provided that a person who makes such inquiries and then purchases *bona fide* will be protected. In this case there is abundant evidence to show that the mortgagee lent money on the mortgage only on satisfying himself that all possible persons who were interested in the estate concurred with regard to the propriety of it. It therefore follows that the plaintiff who was a party to the transaction is clearly estopped from now seeking to impeach the alienation. In this view it becomes unnecessary to discuss any of the other and more difficult questions that have been argued. I agree that the appeal should be allowed with costs here and in the second appeal.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Pasupuleti Narayana Rao ... *Appellant** (*5th deft.*)

v.

Sree Rajah Vasireddi Sree Chandra Mouleswara Prasada Bahadur Manni Sultan Zamindar Garu (Muktyala Estate) ... *Respondent* (*Plaintiff*)

Narayana Rao v. Sree Rajah Vasireddi Sree Chandra Mouleswara Prasada Bahadur.

Madras Estates Land Act—S 151—Diversion of holding from agricultural purposes—What amounts to—Possibility or even certainty of land being in future diverted from such purposes if enough—Building put up on small portion of land for residential purposes, if and when amounts to such diversion

What S. 151 of the Madras Estates Land Act provides is that what has been done must have already materially impaired the value of the holding and rendered it already substantially unfit for agricultural purposes. The mere possibility of the land or even the certainty of the land being built upon and being thereby rendered unfit for agricultural purposes will not be sufficient to bring in the operation of that section. It is not possible to seek to define in any meticulous manner what would

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*L. P. A No. 227 of 1925. 24th January, 1928.

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amount to a diversion of land from agricultural purposes. That depends upon not only the extent of the building but the purposes which it is intended to serve, the object with which the building is put up and the various measures that are taken in respect of the land.

In a case in which the extent of the holding was 2 1|3 acres, a building was put up on about 2 cents of the land, the extent of the land enclosed as a compound round the building was about one acre, and the direct object of the tenant in putting up the building appeared to be to use the building for residential purposes, *held* that there was a diversion of the holding from agricultural purposes within the meaning of S. 151.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips in S. A. No. 1867 of 1923 preferred to the High Court against the decree of the District Court of Kistna at Masulipatam in A. S. No. 119 of 1922 (S. S. No. 439 of 1921 on the file of the Court of the Additional Deputy Collector of Bezwada).

P. V. Rangaram for *Sir K. V. Reddi* for appellant.

A. Krishnaswami Aiyar for *A. Venkatachallam* for respondent.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—This is a Letters Patent Appeal from the judgment of Mr. Justice Phillips sitting as a single Judge in S. A. No. 1867 of 1923. The plaintiff was the appellant in the second appeal and the suit from which it arose was instituted by him for ejecting the defendants from the holdings under the terms of S. 151 of the Estates Land Act. Defendants 1 to 4 were occupancy ryots who had entered into engagements with the plaintiff landholder. The other defendants were in possession of various pieces and parts of the suit holding under sales effected by defendants 1 to 4. Those alienations by the ryots had not become recognised by the landholder under the terms of the Act. The allegations on which the plaintiff came into Court claiming to be entitled to eject the defendants were that the entire holding had been parcelled out by defendants 1 to 4 and alienated to various sets of defendants for building purposes and that the 5th defendant had put up on the portion of the land in his possession a substantial structure for purposes of residence and that thereby the occupancy ryots had materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes within the meaning of the said section. Both the lower courts came to the conclusion that the buildings put up and the acts done by the defendants were not really calculated to impair the value of the holding or substantially unfitted it for agricultural purposes but on the other hand were really

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Srinivasa Aiyengar, J

in the nature of improvements as defined by the Act—improvements suitable to the holding and consistent with the character of the holding. On these findings the lower courts concurred in dismissing the plaintiff's action. It was from that decision that the plaintiff filed the second appeal. The learned Judge on hearing the second appeal came to the conclusion that by the mere act of alienation by defendants 1 to 4, the occupancy ryots, they materially imparied the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. The learned Judge took the view that, as on the evidence the land was sold for building purposes, Defendants 1 to 4 disabled themselves from thereafter objecting to buildings being raised on the pieces of land sold by them and that therefore as there was the certainty of land being built upon for residential purposes the mischief must be deemed to have been caused within the contemplation of S. 151. But it must be observed that what that section provides is that what has been done must have already materially impaired the value of the holding and rendered it already substantially unfit. Both the verbs are used in the past tense. The mere possibility of the land or even the certainty of the land being so built upon becoming unfit for agricultural purposes would in our judgment not be sufficient to bring in the operation of S. 151. We should have felt bound to give effect to this view and allowed this Letters Patent Appeal but having regard to the fact that the question to be considered with regard to this section was of a limited scope, we required both parties to address us on the evidence in the case so as to enable us to come to a conclusion whether what has been done or alleged to be done was sufficient to give the right to the plaintiff to seek to eject the defendants. The whole of the evidence on the record has been read to us. It must, in this connection, be observed that the only appellant before us is the 5th defendant. He is not one of the occupancy ryots who had entered into an engagement with the landholder. As the alienation in his favour has not been recognised, it follows that the plaintiff was entitled to treat defendants 1 to 4 as being still his tenants. The other defendants had been made parties to the action merely because they were in actual possession of the various pieces of land. If the question was whether what had been done by the defendants amounted to a rendering of the entire holding consisting of 14 acres odd unfit for agricultural purposes, then it might have been more difficult for determination than it has actually turned out to be. As none of the other defendants have filed any

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appeal, we are at present concerned only with the extent of the land about 2 1|3 acres or so in the possession of the appellant 5th defendant and the question with reference to him is whether what he has done in respect of the land amounts or not, to use a general expression, to a diversion of the land from agricultural purposes. We use that expression deliberately because taking the whole of S. 151 the principle that seems to underlie that section is that when a holding is in the possession of a tenant he holds it on the terms agreed to or settled between the parties only for agricultural purposes and that as such tenant he is not at liberty to divert the land from the main purpose of the holding namely the agricultural purpose and any such diversion, it is provided, will entail forfeiture whereupon the landholder might sue the tenant in ejectment. As the transfer in favour of the 5th defendant has not been recognised, for the purpose of this Appeal we must take it that what has been done by him admittedly must be deemed to have been permitted or done by the defendants 1 to 4 for purposes of determining the question of forfeiture. Taking it to be so, then the question is merely whether putting up a building that has been admittedly put on there and enclosing a portion of the land round with a fence so as to form a compound for this building has or has not had the effect of diverting the land from agricultural purposes. It is significant that the only witness that has been called for the defence, the 8th defendant in the case, has clearly admitted that the purchases by the defendants were for building purposes. He was himself one of the purchasers. The 5th defendant has not gone into the box. No other evidence has been called. It is admitted that the extent of the land enclosed as a compound round the building is about one acre and it is really a very substantial portion of 2 1|3 acres, the entire extent of the piece of land in question. It is also noteworthy that S. 151 includes a proviso of the land being substantially rendered unfit It was argued by the learned vakil for the appellant very strenuously that merely putting up a building on about 2 cents of the land cannot possibly be regarded as diverting the land from agricultural purposes. We do not think it is possible to seek to define in any meticulous manner what would amount to a diversion and what would not. That depends upon not only the extent of the building but the purposes which it is intended to serve, the object with which it is built and the various measures that are taken in respect of the land. Taking the whole thing into consideration it is clear from the admissions made and the evidence

recorded that the direct object of the 5th defendant in putting up the building was to use the building for residential purposes and we are therefore satisfied that what has been done by the 5th defendant is substantially to divert the land from agricultural purposes. It is impossible to say that when out of a plot of land measuring 2 1|3 acres a house is built and a compound is created for residential purposes there is no such diversion. As therefore on the facts of the case we have come to the conclusion that the building put up and the acts done by the 5th defendant do constitute a diversion of the land from agricultural purposes as provided for in S. 151, we are satisfied that, so far at least as the appeal is concerned, the conditions have been satisfied on which under that section the landholder becomes entitled to file a suit in ejectment. In this view therefore we are satisfied that the decree passed by the learned Judge from whose judgment this Letters Patent Appeal has been filed can be justified. The Letters Patent Appeal is therefore dismissed with costs.

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Srinivasa Aiyangar, J.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

The Madura etc. Devasthanams as represented by the present trustee V. Ramalinga Mudaliar (*Vide order, dated 20th October, 1927, on C.M.P. 3869 of 1927*) ... *Appellant* (Plaintiff.)*

v.

The Madura Municipal Council, through its Chairman. .. *Respondent (Defendant).*

The Madura etc. Devasthanams v. The Madura Municipal Council.

Madras District Municipalities Act (V of 1920)—S 93 (1)—"Professional income"—Meaning—Temple—Surplus devasthanam funds—Investment of—Income derived from—Not taxable.

Income received by a temple from investments of surplus devesthanam funds is not "professional income" within the meaning of S. 93, sub section (1) of the Madras District Municipalities Act, and is not taxable.

Per Wallace, J :—"Professional income" in the Sub-section means income derived from the actual exercise of a profession.

Per Srinivasa Ayyangar, J :—It is only when the making of the investment and the receipt of the income therefrom is followed as a profession that such income can be taxed.

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*S. A. No. 705 of 1925. 30th January, 1928.

The Madura etc. Devasthanams v. The Madura Municipal Council.

Second appeal against the decree of the Court of the 1st Additional Subordinate Judge of Madura in A. S. No. 64 of 1924, presented against the decree of the Court of the District Munsif of Madura Town in O. S. No. 125 of 1923.

P. S. Narayanaswami Aiyar for appellant.

S. Muthiah Mudaliar for respondent.

The Court delivered the following

Wallace, J.

JUDGMENTS :—*Wallace, J.* :—The decision in this case turns on the interpretation of S. 93 of the District Municipalities Act. The Municipal Council of Madura has demanded profession tax from the Receiver of the Sree Meenakshi Devasthanam in Madura on income received by him from investments of surplus devesthanam funds. The devasthanam paid under protest and instituted this suit for a declaration that it was not liable for the tax and for an injunction to prevent collection. The sum in the suit is trifling, a matter of Rs. 2, but the legal and fiscal question involved is obviously of general importance.

So much of the decision in the case will turn on the exact wording of S. 93 (1) that it is better to quote it in full. S. 93, sub-section 1 :—

"If the chairman publishes a notification under S. 80, that a profession tax shall be levied, every person, not liable to the companies' tax, who, within the Municipality and for the period laid down in S. 95, exercises after the date specified in the said notification a profession, art, trade or calling or holds any appointment public or private, or is in receipt of any pension or income from investments or money lending or any source other than houses and lands inside the Municipal limits bringing him within one or more of the classes of persons specified in Schedule IV, shall pay a half yearly tax on his professional income, salary and pension on the scale shown in the said schedule".

The section is headed 'profession tax' and the marginal note is 'license tax on professions'. The substance of S. 93 (1) which is necessary for purposes of this case, as I read it, is that every one in a Municipality who resides there for 60 days in the aggregate in the half year and is in receipt of income from investments shall pay a half yearly tax on his professional income. The short point at issue is whether the phrase 'professional income' is a short, compendious phrase used to include all the kinds of income specified in the sub-section, as contended by the rsspondent, or whether it means income derived from the actual exercise of a profession, as contended by the appellant. According to the respondant, any income of the kind specified in the first part of the sub-section is taxable ; but according to the appellant such income is only taxable if and when it can be

legitimately said to have been obtained from the exercise of a profession.

It cannot be gainsaid that the wording of the section is very unhappy. The word 'profession' is not defined, but evidently it was not designed to cover all the sources of income specified in the sub-section. For example, 'profession' as used in the sub-section does not mean art, trade, calling, holding an appointment, being in receipt of a pension, or an income from investments, etc. It cannot be here used definitively of these other sources of income because, to define a word by using the word defined offends against all canons of interpretation. True the word is used as descriptive of the tax ; but that is merely a device to save time and multiplicity of words. The tax is on professions and other sources of income, but for purposes of short statement the tax is to be known as 'profession tax'. I am unable to agree with the respondent that when the word is again met in its adjectival form 'professional' it is used in its compendious sense and not in its definitive sense. Had the former been the idea, the addition of the words 'salary and pension' would be not only unmeaning but misleading, since, 'profession' in its compendious sense already includes the receipt of salary and pension, while the words 'professional income' evidently exclude salary and pension. The appropriate, exhaustive, and compendious word before "income" would then have been the word "such" and not "professional". (Incidentally, it may be remarked that the use of the word "and" instead of "or" between "salary" and "pension" is also puzzling). We must then give some independent meaning to the words "professional income" which are not equivalent to "such income" and the ordinary meaning which the words usually bear is "income received from the exercise of a profession". The first part of the sub-section deals with the class of persons to be taxed, the latter part declares under what circumstances they become liable to pay the tax, and in my view limits it to cases in which they are in receipt of salary or pension or are marking a professional income. I am clear that the temple in gaining a small addition to its income by investing its surplus funds cannot in any sense be said to be exercising a profession or earning a professional income.

I do not think that any help is to be derived from a reference to corresponding sections in other Acts, like the District Municipalities Act of 1884 or the Madras City Municipal Act or from rulings thereunder, because we have no means of knowing whether or no the legislature in enacting the present

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section intended to widen or restrict the compass of its net of taxation as cast in other Acts.

It is not necessary in the view that I take above to go into the question of whether or not the deity is a person or whether it resides in Madura within the meaning of S. 95 of the Act.

I am therefore of opinion that the tax is not leviable. This result is also in consonance with the well known principle of interpretation of fiscal enactments, that if the language is at all ambiguous it must be interpreted in the manner most beneficial to the subject. Taxing statutes must state with the utmost clearness what and whom and in what manner they are taxing.

I would therefore allow the appeal and restore the decision of the District Munsif with costs of the appellant in all courts.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I am in entire agreement and I wish to add very little. As pointed out by my learned brother the section under consideration is only a specimen of the present day hasty and inaccurate legislation by large democratic bodies without the aid of trained and competent legislative draftsman.

The contention of the respondents really amounted to this: That the section should be read, as though the word, "professional" was not there at all in that part of the section where the taxable income is defined. Such contention, it follows, cannot possibly be accepted. The word "professional" in the expression "on his professional income", being really in the nature of an expression deliberately introduced in the context and otherwise unnecessary, cannot, on any proper rule of interpretation, be omitted to be given its proper definitive significance. In the first part of the section the clause is defined of persons who are subject to the tax and in the latter part the income that is liable to assessment. The receipt of interest from investment cannot be said to be salary or pension. So, if it is to be taxed, it can only be taxed as professional income. On the face of it the income from investment cannot be regarded as professional income. But in the first part of the sentence a person who is in receipt of income from investments is included amongst the persons liable to be taxed. If so, it seems to follow that it is only when the receipt of the income from investment can be properly said to be a professional income, such income can be taxed. From this it may be derived that such intention of the legislature as is capable of being gathered, and in any case on a strict interpretation of the terms of the section which is called for, it must follow, that it is only when the making of the investment and the

receipt of the income therefrom is followed as a profession that such income can be taxed.

It has not been contended before us that either the idol which is the legal person concerned or the members of the committee can, having regard to the nature of the investment made by them, be said to carry on business in investment.

I therefore agree to the order proposed by my learned brother.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

Kumaraswami Asari and two others .. *Petitioners* in both the petitions—(Appellants in S.R. No. 17519 of 1926—Appeal sought to be preferred to the High Court)*

v.

Poojari Lakshmana Goundan and others .. *Respondents in do.*

Civil Procedure Code, 1908, S 92—Scheme suit—Appeal by plaintiffs in, filed within time—Return thereof for re-presentation—Fraudulent abstention by plaintiffs from re-presenting—Fresh copies of decree and judgment obtained by other worshippers and fresh memorandum of appeal duly stamped, filed by them—Case of one of re-presentation of original appeal or of presentation of a fresh appeal—Excusing delay in re-presentation or presentation of a fresh appeal—Sufficient ground for.

A suit brought by some of the worshippers of a temple with the sanction of the Collector under S. 92 of Civil Procedure Code, for a scheme and other reliefs relating to the temple is a representative suit; and an appeal filed by the plaintiffs in the said suit against the decree therein is one filed for the benefit of the temple and the general body of worshippers.

The plaintiffs in a scheme suit filed an appeal within time to the High Court against the judgment of the Court below. The appeal was returned to them for re-presentation after correcting some formal defects. Acting in collusion with the respondent-trustee they abstained from re-presenting the appeal. On hearing that, three other worshippers applied to the court below for copies of its decree and judgment, and, as soon as they obtained the said copies, filed an appeal to the High Court against that decree and judgment with petitions for leave to appeal and for excusing the delay.

Held, that the applicants being constructively, though not *eo nomine*, parties to the appeal previously filed within time and fraudulently not re-

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*C. M. P. Nos. 4249 and 4250 of 1926 and S. R. No. 17519 of 1926. 16th November, 1927.

presented, the case was one of re-presentation of the appeal previously filed within time and of excusing the delay in the re-presentation thereof, and was not one of the presentation of a fersh appeal and of excusing the delay in its presentation under S. 5 of the Limitation Act.

The fact that, as the original papers in the appeal previously filed had been taken away and not brought back, the applicants, in conformity with the rules, presented a copy of the judgment and decree and the memorandum of appeal, and, to prevent any further difficulty as to limitation, again paid the stamp upon the appeal which they presented, would not make their appeal a fresh appeal by third parties requiring excuse under S. 5 of the Limitation Act.

Held further, on the facts, there were sufficient grounds for excusing the delay, whether the case was considered as one of delay in re-presentation or in the presentation of a fresh appeal.

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to excuse the delay in filing S. R. No. 17519 of 1926 and to permit the petitioners to file and prosecute the same respectively and S.R. No. 17519 of 1926 appeal sought to be preferred to the High Court against the decree, dated 30th November, 1925, of the Court of the Subordinate Judge of Salem in O. S. No. 4 of 1916.

K. V. Krishnaswami Aiyar, K. S. Sankara Aiyar and *B. V. Viswanatha Aiyar* for petitioners.

T. R. Ramachandra Aiyar and *P. R. Ganapathi Aiyar* for 1st respondent.

V. Ganapathi Aiyah for respondents 4 and 5.

The Court made the following

ORDER :—This appeal arises out of the decision of the Subordinate Judge of Salem, in connection with a temple. The suit was filed with the sanction of the Collector for a scheme and for recovery of the properties of the temple and for the removal of the present Dharmakartha in possession and management. The question was raised by the 1st defendant in the suit that the temple was not a public temple, but was a private temple. On this question a Bench of the High Court differed and when the matter was taken in Letters Patent Appeal, it was ultimately held that the temple was a public temple. This judgment of the High Court was confirmed by the Privy Council. The suit was then remanded for disposal to the lower court. The Subordinate Judge passed a decree framing a scheme and as regards certain properties which the defendant claimed to be his private properties he found in his favour, and held that the properties did not belong to the temple. It is against that decree, that an appeal was presented by the original plaintiffs on the 24th April, 1926, and it was returned for representation on the 23rd July, 1926. It was never re-presented.

Meanwhile, the defendant applied for possession of the properties which the Subordinate Judge found not to be properties of the temple. It is alleged that although the plaintiffs admitted that they had preferred an appeal against that portion of the judgment of the Subordinate Judge, no objection was taken to the application when it came on for hearing, and when the present applicants found this out, suspicions were aroused and they found that the appeal was not re-presented. They now apply for leave to appeal against that decree and for an order excusing the delay. Allegations are made in the affidavits filed on behalf of the petitioners that the plaintiffs who filed this suit have been won over and have been paid a large sum of money and so they failed to re-present the appeal. For the respondent it is contended that there was no such misconduct on his part and also that the present petitioners are not worshippers within the meaning of S. 92 of the Code and therefore not competent to prefer an appeal against the decree. Affidavits and counter-affidavits have been filed. We think that this is not a matter which we can decide on affidavits, and that it will be more satisfactory that the matter should be decided on evidence. We direct the Subordinate Judge to take evidence as to whether the petitioners or any and which of them are worshippers of the temple. The finding will be submitted within one month. The other questions raised will be decided after the receipt of the finding. The time for objections is ten days. These petitions will stand over till the evidence is received.

[In pursuance of the above order the Subordinate Judge of Salem, submitted a finding to the effect that the petitioners were worshippers of the suit temple within the meaning of S. 92 of the Civil Procedure Code.]

These petitions and S. R. No. 17519 of 1926 came on again for hearing after the return of the finding of the lower court upon the issues referred by this court for trial.

K. V. Krishnaswami Aiyar, K. S. Sankara Aiyar and *B. V. Viswanatha Aiyar* for petitioners.

T. R. Ramachandra Aiyar and *P. R. Ganapathi Aiyar* for 1st respondent.

V. Ganapathi Aiyah for respondents 4 and 5.

The judgment of the court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—These applications arise out of an appeal preferred against the final decree of the Subordinate Judge of Salem in O. S. No. 4 of 1916. The suit was by three worshippers who had obtained the necessary sanction of the

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Collector under S. 92, Civil Procedure Code, for a scheme and other reliefs relating to the Sri Kandaswami, also known as Subramania Swami temple. One of the defences of the defendants who were the pujaries of the temple was that the temple was not a public temple, but a private one. The Subordinate Judge upheld the contention and dismissed the suit. On appeal there was difference of opinion between two learned Judges and the matter went up to a Full Bench of this court and was decided in Letters Patent Appeal No. 10 of 1917 that the temple was a public temple and the suit was remanded for the purpose of framing a scheme and determining the properties of the temple. Against this judgment of the High Court an appeal was preferred to their Lordships of the Privy Council and their Lordships of the Privy Council affirmed the decision of the High Court with the result that the suit went back to the Subordinate Judge. The Subordinate Judge, on the 30th November, 1925, passed a decree. A scheme was framed but as regards the valuable properties which are alleged to belong to the temple of the value of nearly two lakhs yielding an income of Rs. 6,000 a year he held they were private properties of the 1st defendant. This judgment was pronounced on the 30th November 1925, and against that judgment an appeal was preferred by two of the worshippers on 22nd April 1926 to the High Court. The appeal which was presented within time was returned for re-presentation on the 23rd July 1926, because some formal defects had to be corrected. Between the 30th November, 1925 and the 23rd July, 1926, there were proceedings which were going on against the 1st defendant who was appointed as Interim Receiver. The affidavits show that so far as the 1st defendant is concerned, his conduct was adversely commented upon by the High Court in certain proceedings before the High Court and so far as we can see from the remarks of the learned judges of the High Court the 1st defendant's conduct was not honest in several matters. The proceedings about his Receivership which were pending before the Subordinate Judge came on the 30th July, 1926, and although till then we find hot contests between the persons who presented the appeal to the High Court and the Receiver who was the 1st defendant in the suit, all on a sudden the petition against the Receiver was not pressed, so that allegations which would have been usually enquired into against this receiver, the 1st defendant, were suddenly abandoned. We find that the appeal, which was returned for re-presentation on the 23rd July, 1926, about 7 days before this petition, was not pressed and was not re-presented subsequently and it is easy from these

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facts to assume that the non-re-presentation had an intimate connection with the withdrawal of the allegations against the Receiver on the 30th July, 1926. As we said before, this action was a representative action and the suit being filed on by the three plaintiffs on behalf of themselves and of the general body of worshippers, the appeal was also an appeal which was presented for the benefit of the temple and the general body of worshippers. Had the appeal been prosecuted, it would have bound the whole general body. When some of the worshippers found that their allegations against the Receiver were suddenly withdrawn on the 30th July, 1926, they suspected that there was something wrong and they admittedly came to Madras to see what became of the appeal that was presented and was returned for re-presentation on the 23rd July, 1926, and they found that the appeal was not re-presented. They then went to the Sub-Court and applied for a copy of the judgment and decree on the 4th August, 1926, and got the copies on the 9th August. On the 11th August they presented an appeal with an affidavit stating the facts which led to the present course being adopted. They allege that the non-re-presentation was due to an improper motive and they say that they are informed that Rs. 10,000 was paid to the three appellants in the case and the matter was withdrawn and allowed to drop. They allege that it will be a great loss to the temple if the appeal is not properly disposed of. When the matter came on before us one preliminary objection taken was that the petitioners before us were not worshippers of the temple and, as this would go to the root of the application, we directed the Subordinate Judge to take evidence and return a finding as to whether they were worshippers or not. The Subordinate Judge has gone into the evidence adduced before him and submitted a finding that the present petitioners are worshippers and an objection has been filed, but we see no reason to hold that the Subordinate Judge was wrong in holding that these petitioners were worshippers of the temple. There is thus clearly a *locus standi* to apply.

The next question is whether, under the circumstances of this case, this application should be granted. We are inclined to hold on the facts of this appeal that, this appeal having been presented in time by two worshippers for themselves and other worshippers and having been returned for re-presentation, there is no question of excusing the delay under S. 5 of the Limitation Act. Under the rules of the High Court, if the re-presentation is not made within the time allowed, the court can, on proper grounds shown, excuse that delay, and receive the

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appeal. The suit being a representative suit, we think that two or more worshippers who would be constructive parties to the appeal have a right to require the appeal which was properly presented to be re-presented and received by the court and adjudicated on its merits. They are in the position of being parties and, if one of the parties receives the appeal memo. back from the court and does not present it, it is difficult to see how the other persons, parties to the suit, can be prejudiced by the action of one person. The fact that the present petitioners are not on record by name would not make any difference as they are constructive parties bound by any decision that may be passed in the appeal just as if they were parties named in cause-title of the appeal and it seems to us that they are entitled to see that proper adjudication is made in the appeal. In the present case we are not satisfied that the non-re-presentation was *bona fide* and we come to the conclusion that there has been some indirect motive for the appeal not having been re-presented. We think that the court has in cases under S. 92, ample power to see that the interests of the institution are protected. Even in cases of compromise it has now been decided by their Lordships of the Privy Council that persons not actually on record have a right to apply to prevent the parties on record from compromising to the detriment of the institution. We would only refer to the case in *Sankaralinga Nadan* v. *Rajeswara Dorai* (1). In the present case till the High Court passed orders upon the appeal petition presented in time we think that the appeal should be treated as pending for the purposes of any application the worshippers may make and in this view there is no question of limitation under the Limitation Act and we can treat the present application as an application in a pending appeal. As the original papers have been taken away and not brought back, the present petitioners had under the rules to present a copy of the judgment and decree and the grounds of objection and they, in order to prevent any further difficulty or troubles as to limitation, have again paid the stamp upon the appeal which they presented, but this would not make the present appeal a fresh appeal by third parties requiring excuse under S. 5 of the Limitation Act. Even assuming that this appeal should be treated as a fresh appeal presented on the date when the present petition was presented, we think that ample material exists under S. 5 of the Limitation Act to excuse delay. We have already set out the facts and we think that the appellants who

1. (1908) L R 35 I A 176 : I L R 31 M 236 : 18 M L J 387 (P C).

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presented the appeal on the 22nd April, 1926, and took it back for re-presentation on the 23rd July, 1926, have fraudulently and with an improper motive not re-presented the appeal. We can find nothing *bona fide* in the whole transaction If the appellants were honest, they could easily have come before us in this matter and brought in the original papers and explained to us why it was that it was not re-presented. The 1st respondent filed an affidavit saying that he consulted some vakil friends and that they advised there was not much chance of altering the scheme. The vakil who now appears is not the vakil who appeared then and we are not prepared to accept the vague statement that some vakil friends advised him, especially as we think, the appeal is by no means a hopeless one. The statement that the object for which the suit was brought was established is not correct, because valuable properties which were claimed for the temple by the plaintiffs were the subject matter of the appeal. The affidavit is vague and we do not think that the first plaintiff's affidavit can be acted upon. We think the present petitioners have acted with due deligence and *bona fides.*

Under these circumstances we are of opinion that whether the case be looked at from the point of view of re-presentation or fresh presentation of an appeal, there are grounds which entitle us to excuse the delay either in re-presentation or in presentation of the appeal and admit the appeal now filed by the petitioners. This will enable the whole matter to be gone into when the appeal is disposed of and prevent valuable properties being lost to the temple. A perusal of the Subordinate Judge's judgment shows that the appeal cannot be said to be a hopeless one and the worshippers are entitled to the benefit of the adjudication by the High Court. The respondents will pay the costs of these applications both here and at the enquiry. We fix Rs. 100 as vakil's fee.

A. S. V. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

A. M. Ponnuswami Chettiar and others. .. *Appellants** (*Plaintiffs*)

v.

The British India Steam Navigation Co., Ltd., and another ... *Respondents* (*Defendants*).

Ponnuswami Chettiar v. The British India Steam Navigation Co., Ltd.

Shipowner—Goods not delivered by—Suit by consignees for value of—Exemption from liability claimed by shipowner in—Proof of—Onus—Quantum

In a suit brought by a consignee against the shipowners for the value of goods not duly delivered according to the terms of the bill of lading, reliance upon any clause exempting shipowners from liability may be made good if it can be shown that the whole quantity failed or omitted to be delivered was so failed or omitted to be delivered because of some reason which gave exemption in respect of which the shipowners were exempted from liability The burden is on the shipowners to establish by clear and cogent evidence that their inability to deliver was entirely due to causes or reasons in respect of which they had an exemption under the clauses of the bills of lading

Second Appeal against the decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 10 of 1924, preferred against the decree of the Court of the District Munsif of Negapatam in O. S. No. 227 of 1920.

A. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for appellants.

O. T. Govindan Nambiar, instructed by *Moresby and Co*, for respondents.

The Court delivered the following.

JUDGMENT :—This is a somewhat difficult case raising a somewhat interesting question of maritime law. The plaintiff, who is the appellant before me, instituted the suit against the British India Steam Navigation Co., Ltd , and the Madura Co., Ltd., making both of them defendants and claiming the value of 109 bags of rice alleged by him not to have been duly delivered according to the terms of the bill of lading in respect of a consignment of a very large quantity of bags of rice and broken rice consigned to him from Rangoon. The total quantity of the bags short-delivered to him was 335. Out of these it is found that in respect of 102 bags and another lot of 15 he got paid by the Insurance Company and in respect of another quantity of 108 bags the defendant companies or company admitted liability and paid the value. Out of the remaining 110 bags

*S. A. No. 1397 of 1924. 24th March, 1927.

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the plaintiff admitted that one bag out of the total 222 which were found to have been damaged by sea water bore his marks and therefore in respect of that one bag the plaintiff has made no claim against the defendants. That was how the claim came to be limited and to be for 109 bags. The trial court granted a decree in favour of the plaintiff. The defence of the defendants was that 222 bags having been found to be sea-damaged and unfit for consumption and so dealt with by the Port authorities and thrown into the sea, the marks on these 222 bags were unidentifiable and therefore these 222 bags must be presumed to have belonged rateably to the various consignors according to the number of bags consigned by each. Apparently, though it does not seem to appear on the evidence, the payment made by the defendant companies was on working out on that basis. They seemed to have taken the 222 bags sea-damaged and, arriving at the proportion allottable to the plaintiff and finding the same to be 110, appear to have admitted liability in respect of the balance of 108 and paid up the same. In the Court of First Instance the District Munsif found as a fact that the case set up by the defendants was not established, namely, that the marks were unidentifiable and held for the contention of the plaintiff that they were identifiable and that none of the bags except the one which was given up bore the marks of the plaintiff. On that ground he came to the conclusion that the only ground of exemption pleaded by the defendants, namely, that the 109 were included in the 222, not having been made out, the defence failed, and he gave judgment accordingly for the plaintiff. The learned Subordinate Judge in the lower Appellate Court however found the isssue whether the marks on the 222 bags were or were not identifiable in favour of the defendants and according to their contention and holding that they were, as contended for, unidentifiable, held that on a principle of equity the defendants were entitled to apportion the 222 bags according to the total number of bags constituting each consignment and on that basis plead exemption so far as the plaintiff was concerned in respect of the 109 bags. This second appeal has been filed against that judgment of the Subordinate Judge.

The learned vakil for the appellants who argued the case carefully and clearly has drawn my attention to the case of *Frank Stewart Sandeman & Sons v. Tyzack & Bromfoot Steamship Co., Ltd.* (1). It is clear on a perusal of the judgment of the Law Lords in that case that the case of *Spence* v. *The Union*

1. L R (1913) A C 680.

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Marine Insurance Company (2) was the leading decision in which the theory of tenancy in common in respect of the entire lot of unidentifiable goods was first postulated and made the ground of decision. But it is necessary to observe in connection with that case that there was no doubt whatever that the entire quantity of undelivered goods in respect of the consignment by the particular ship was there and, as all the goods were there but only the marks were obliterated, the shipowners by the conditions of the bill of lading were not bound to deliver according to marks and, as it is perfectly clear that all the goods remaining to be delivered must be comprised in this entire lot of unidentifiable goods and so they were entitled to apportion them proportionately amongst the various consignees according to the total quantity of their consignments. Though the principle of that case was not questioned in the case before the House of Lords, their Lordships in the House of Lords differentiated that case from the one before them by pointing out that, in the case they were considering, it was clear that there were other missing bales and it could not possibly be postulated that the bales omitted to be delivered to the claimant in that case had not been among the bales that were missing, apart from the quantity which remained there unidentifiable. In other words, the principle of the decision of their Lordships appears to be this: Reliance upon any clause exempting shipowners from liability may be made good if it can be shown that the whole quantity failed or omitted to be delivered was so failed or omitted to be delivered because of some reason which gave exemption in respect of which the shipowners were exempted from liability. This, however, the shipowners have got to prove. Such a thing cannot be held to be proved, their Lordships said, if, apart altogether from the quantity of unidentifiable goods which were landed, there were other goods which are admittedly missing and one cannot be certain whether the goods failed and omitted to be delivered to the claimant could not have been among the goods which became missing in that manner. To put the same matter in another way, the burden is on the shipowners to establish by clear and cogent evidence that their inability to deliver was entirely due to causes or reasons in respect of which they had an exemption under the clauses of the bills of lading. Now then, if that is the true principle, as I take it to be, the question is, what is the result we arrive at on the application of those principles to the present case? At first I was inclined to agree with the contention on behalf of the appellants that, on the

2. (1868) L R 3 Com. Pleas 427.

authority of Sandeman's case, *Frank Stewart Sandeman & sons v. Tysack & Bromfoot Steamship Co., Ltd.* (1), there was no room in this case for the application of the doctrine of tenancy in common in respect of unidendtifiable goods, because it is clear on the facts of this case that, apart altogether from the goods in respect of which the plaintiff was able to obtain damages from the Insurance Company and apart from the 222 bags of unidentifiable goods, there were other goods which were missing or which were lost. If there had been no such loss, it is difficult to conceive how the defendants could have agreed to be liable for 108 bags which they did. If, therefore, there were other bags also that were lost in the course of the voyage, then one cannot be certain whether the total of 109 bags in respect of which the plaintiff makes the claim were not included or comprised in the quantity lost during the voyage in respect of which the defendants admitted liability. If therefore on the facts of the present case we could not be certain that in the 222 bags of unidentifiable goods there were any belonging to the plaintiff, it is impossible to hold that the defendants have made out the ground of exemption from liability. But Mr. Nambiar, the learned Counsel for the defendants, has drawn my attention to Exhibit V-a in this case. It is a statement of outturn of cargo by the steamer in question. There under the heading of "Manifested quantity" it is noted that the total number of bags was 84,182. Under the second column "Boat note quantity" is shown as 84,016 and under the third column the "Actual landing quantity" is also shown as 84,016. Thus it would be seen that the difference between the manifested quantity and the boat note quantity is only 166 bags; that is to say, the total number of bags that were omitted to be delivered to the various consignees apart from the unidentifiable goods and also the goods in respect of which insurance claims have been made and admitted was 166. Out of this 166, the defendants have already paid for 108 bags. The receipt of the value of those 108 bags is admitted. The balance of the quantity lost or unaccounted for by the defendants is only 58. Applying the principle of the two decisions referred to above, what we find is that it is possible that all these 58 bags also were bags belonging to the plaintiff and therefore bags in respect of which the defendants were liable under the bill of lading and could claim no exemption. But that is taking it against the defendants at the very highest, though I have no doubt it is most unlikely. However, when it is a question of

1. L R 1913 A C 680.

the application of such general principles and burden of proof. I think the proper method is to take it against the party at the very highest and compute on that basis. So, taking and assuming that all the other 58 bags which were also lost belonged to the plaintiff, we find that the remaining 51 bags must have been included in the 222 of unidentifiable goods. This is a result arrived at by mathematical calculation in respect of which it seems to me there cannot possibly be any doubt. I may however advert in this connection to an argument attempted to be put forward by the learned vakil for the appellants with regard to Ex. V-(*a*). He tried to argue that that statement cannot be relied on for the purpose of showing how many bags were lost otherwise. But it is a statement made in the usual course of business by respectable companies and I for my part refuse to accept the suggestion made on behalf of the appellants that the figures therein shown are not correct. It would lead to very serious consequences if responsible companies concerned with such a lot of shipping can be regraded as capable of entering incorrect figures in the statements prepared in the regular course of business. I therefore reject this suggestion on behalf of the appellants altogether. Then the result is that, so far as 51 bags out of the quantity claimed by the plaintiff are concerned, the defendants have mathematically demonstrated that at least that number must have been included in the 222. So in respect of that number of bags they are exempt from liability because they have been declared by the Port authorities to be unfit for human consumption and dealt with on that basis. Under the bill of lading they are not liable for the obliteration of marks and if, as a matter of fact, there were 51 bags belonging to the plaintiff in that quantity, they are not liable for non-delivery of the same. As regards the 58 bags, however, I must find that, on the application of the very principles contended for, it has not been shown, or, established that those were or must have been included in the quantity of unidentifiablt goods. In the absence of any such evidence, the conclusion is clear that the defendants have not made out the ground of their exemption. I have therefore come to the conclusion in this case that the decree of the lower Appellate Court must be set aside and that, instead, there must be a decree for the plaintiff for 58|109 of the amount decreed in favour of the plaintiff by the Court of First Instance and, taking that the superior and the inferior bags were really proportionate, the amount would be Rs. 770-8-0. This figure on calculation is admitted to be correct on both sides. Mr. Nambiar for the respondents took up another point with regard

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to the joinder of defendants. He argued that the 2nd defendant, the Madura Company, Ltd., was admittedly styled by the plaintiff himself as the agent of the 1st defendant company and there was therefore no reason for joining the 2nd defendant company. But it must be observed that both the defendants have acted together in all these proceedings, signed the same written statement, took the same pleas and acted in all proceedings conjointly. No doubt, if the question had been pressed, the plaintiff would have been bound to elect to have the decree against only one of the parties and I have no doubt on the allegations it must be against the first defendant company alone. But I find that, though there was a decree passed against both the defendants in the Court of First Instance, there was no ground of appeal taken in the Memorandum of Appeal to the Lower Appellate Court. I must therefore assume that the objection on the ground of misjoinder of defendants was deliberately abandoned and, I have no doubt, for excellent reasons, because it is notorious that, though they are different companies, they have no different interests so far as the subject-matter of this litigation is concerned and, in these circumstances, I do not think any useful purpose is likely to be served by pursuing the matter further.

There must therefore be a decree for Rs. 770-8-0 in favour of the plaintiff with interest thereon from this date till the date of payment. The parties will pay and receive proportionate costs throughout.

A. S. V. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Parthasarathi Naicker ... *Petitioner* (Complainant)*

v.

T. Krishnaswami Aiyar ... *Respondent (Accused).*

Parthasarathi Naicker v. Krishnaswami Aiyar

Criminal Procedure Code (V of 1898), S. 250—Discharge of accused after hearing some of the prosecution-witnesses only—Awarding of compensation to accused—Legality

The accused was discharged by the Trial Magistrate after hearing only some of the prosecution-witnesses, as the Magistrate thought that the remaining witnesses would not materially help the case. The Magistrate awarded compensation to the accused.

Held, (on revision) that it is only after the examination of all the evidence the complainant wanted to adduce that the Magistrate can come

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*Crl. R. C. No. 371 of 1927. 7th October, 1927.
(Crl. R. P. No. 327 of 1927).

Parthasarathi Naicker v. Krishnaswami Aiyar.

to the conclusion that the case is false and vexatious and consequently, the order of the Magistarte awarding compensation in this case was not justifiable in law and should be set aside.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Deputy 1st Class Magistrate of Saidapet in C. C. No. 56 of 1926.

V. L. Ethiraj for petitioner.

V. N. Shama Rao and *P. Viswanatha Aiyar* for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—This is an application to revise the order of the Sub-Divisional Magistrate of Saidapet, awarding compensation to the accused in a case brought by the petitioner. The learned Magistrate disposed of the case after hearing only five of the prosecution witnesses and he did not care to examine the rest of the evidence as he thought that the remaining witnesses would not materially help the case. In these cirsumstances, he was not justified in awarding compensation to the accused. It is only after the examination of all the evidence the complainant wanted to adduce that he could come to the conclusion that the case is false and vexatious. No doubt he was entitled at any stage to discharge the accused, but that would not be a ground for awarding compensation to the accused. I therefore set aside the order of compenastion and direct the amount, if recovered, to be refunded to the petitioner.

N. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

The Chairman, Municipal Council, Conjeevaram ... *Petitioner** (*Complainant*)

v.

D. R. Nageswara Iyer .. *Respondent* (*Accused*).

The Chairman, Municipal Council, Conjeevaram v. Nageswara Iyer.

Madras District Municipalities Act (V of 1920), Ss. 195 and 321—Thatched pandal over verandah—License taken out before construction—Continuance of pandal after the expiry of the period of the license—Fresh license, if necessary.

The owner of a building constructed a thatched pandal over his verandah after getting license from the Chairman of the Municipality. He did not take out a fresh license for the continuance of the same pandal after the expiry of the period of the license.

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*Crl. R. C. No. 490 of 1927. 10th November, 1927.
(Crl. R. P. No. 430 of 1927).

The Chairman, Municipal Council, Conjeevaram v. Nageswara Iyer.

Held, that a license was necessary under S. 195 of the Madras District Municipalities Act only in the case of a construction or re-construction of the pandal and no license was necessary for merely keeping the pandal which had already been constructed after taking out a license.

Held also, that the provisions of S 321 of the Act do not apply to permission granted under S. 195.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Stationary 2nd class Magistrate of Conjeevaram, dated 9th April, 1927, in C. C. No. 140 of 1927 on his file.

C. Narasimhachariar for petitioner.

R. N. Aingar and *T. S. Krishnaswami Aiyangar* for respondent.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—This is an application to revise the Order of acquittal by the 2nd class Magistrate of Chingleput of the counter-petitioner in the prosecution launched by the Conjeevaram Municipality under Ss. 195 and 321 (7) of the District Municipalities Act. The Magistrate held that the counter-petitioner was not bound to take out a license for the maintenance of a thatched pandal over his verandah. Mr. Narasimhachariar for the Municipality contends that the license which was granted to the counter-petitioner expired on the 31st March, 1926, and he, not having taken out a license for the year 1926-27, is liable under the Act to the penalty.

The question turns upon the construction of S. 195 of the District Municipalities Act, which is in the following terms :

"No external roof, verandah, pandal or wall of a building shall be constructed or reconstructed of grass, leaves, mats or other inflamable materials except with the permission of the Chairman."

In this case the thatched roof over the verandah was constructed with the permission of the Chairman. There is no question of its being reconstructed now. The counter-petitioner was prosecuted for keeping the thatched roof without obtaining permission for keeping it during the year 1926-27. When a person wants to put up roof, verandah or pandal or wall of a building of grass, leaves or mats or other inflamable materials he has to obtain the permission of the Chairman and if he does not obtain permission of the Chairman he is liable to penalty under S. 313. But, after he has once obtained permission to put up a structure of the kind mentioned in S. 195, is he bound to obtain a license from year to year? S. 195 does not speak of license. But reliance is placed upon S. 321 which clearly says:

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"when any license or permission is suspended or revoked or when the period for which it was granted, or within which application for renewal should be made, has expired, whichever expires later, the grantee shall for all purposes of this Act, or any rule or bye-law made under this Act be deemed to be without a license or permission."

I do not think that this clause applies to permission granted under S. 195. As Mr. R. N. Aingar who appears for the counter-petitioner points out, S. 195 is in the Chapter relating to buildings regulations, under which, a person who wants to put up a building has to get permission before doing so ; the construction should be completed within the period allowed and, if he is not able to complete the building within the period allowed, he must obtain further permission under S. 204. But in the case of a flimsy structure it does not take very long to put it up and after it is once completed there is nothing in the Act which requires the owner of flimsy structure mentioned in S. 195 to take out a license for its continuance. In construing a section like S. 195, the Court is not entitled to travel outside the clear wording of the section and to introduce into it the word 'continuance'. The contention of Mr. Narasimhachariar is that we must read into the section the word 'continuance'. There is no warrant for such a contention in any relevant section of the Act. Apart from the permission which is required for the construction or reconstruction there does not appear to be anything else left to be done by the owner of a building who puts up one of the things mentioned in S. 195. In this view of the case, the judgment of the lower court is correct, and I dismiss the petition.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

N. Muniswami Mudaliar .. *Plaintiff.**

v.

R. Rajagopala Mudaliar .. *Defendant.*

Muniswami Mudaliar v. Rajagopala Mudaliar.

Passing-off action—Right of—Essentials of—Fraud—Charge of—Effect of—Pleadings—Fraud not alleged in—Amendment of plaint by alleging—Permissibility—Conditions—Amendment after plaintiff's examination.

In a passing-off case, fraud is not a necessary element of the right of action. That the defendant's conduct is calculated to mislead is the foundation of the action. But proof of fraudulent intention on the part of the

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*In the matter of an interlocutory application in C. S. No. 370 of 1926. 17th February, 1928.

defendant may materially assist the plaintiff in establishing this probability of deception.

If a charge of fraud is to be made out at the trial, it should be put forward clearly and prominently on the pleadings.

An amendment will not be generally allowed for the purpose of adding a plea of fraud, except where strong grounds exist.

Where the omission to refer to fraud in the plaint was due to an oversight, and an amendment of the plaint by adding the plea of fraud was not suggested to the plaintiff by anything that happened at the trial, and the plaintiff's object in seeking the amendment was not to fabricate evidence to meet some new point raised, *held* that in the interests of justice, the plaint ought to be allowed to be amended by adding the charge of fraud

S. Doraiswami Aiyar, Mohamed Ibrahim and *C. Srinivasa Chari* for Plaintiff.

P. Venkataramana Rao and *N. K. Mohanaranyam Pillai* for defendant.

The Court delivered the following.

JUDGMENT :—This is an action for passing-off. The plaintiff publishes a journal known as "Ananda Bodhini" and he complains that the defendant recently started a periodical under the name "Ananda Guna Bodhini" and that the use of this name is calculated to deceive and to cause the defendant's goods to be taken for the goods of the plaintiff. Mr. S. Doraiswami Aiyar for the plaintiff now asks for permission to amend his plaint by alleging fraud. That the imitation of the plaintiff's name is calculated to mislead, is distinctly alleged in the plaint. For the plaintiff, it is contended that the allegation of fraud is already there, but that it is sought to put forward this case more clearly in the pleadings. I do not agree that the plaint contains a charge of fraud and the question therefore is, is the plaintiff now to be given liberty to amend his plaint ?

In a passing-off case, it is well settled that fraud is not a necessary element of the right of action. The cause of action set forth in the plaint is thus complete ; but proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. [See Kerly on Trade Marks, 6th Edition, page 550]. As has been observed by Earl Loreburn in *Claudius Ash, Sons & Co.* v. *Invicta Manufacturing Co.* (1),

"When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but still it is a step, even though it be a short step"

1. (1911) 29 R. P. C., at p. 475.

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The principle underlying this, is thus tersely stated in the course of the argument, in the same case, when it was before the Court of Appeal by Cozen's Hardy, M. R.

"If you find a defendant who is a knave, you may presume he is not a fool."

That the defendant's conduct is calculated to mislead is thus the foundation of the action, although fraud on the defendant's part helps the plaintiff in proving that there is this probability of deception.

All the same, it is well established that if a charge of fraud is to be made at the trial, it is essential that it should be put forward clearly and prominently on the pleadings. *Kerly*, page 548.

The plaintiff's Counsel opened his case in March 1927 and did no more than give a brief outline. At that time, Mr. Doraiswami Aiyar clearly indicated that he was going to rely upon fraud and referred to certain instances which, if true, he contended, would support that charge. After this, the case was repeatedly adjourned to suit the convenience of the plaintiff or the defendant, and I shall not be wrong in stating that the defendant is at least equally to blame for this with the plaintiff. When the case was now taken up, the plaintiff began to give oral evidence and it was then brought out clearly that he wanted to allege fraud and I pointed out that this could not be done, as the case of fraud was not distinctly put forward in the plaint and as there was no issue upon it.

It is in these circumstances that the present application came to be made. Mr. Venkataramana Rao for the defendant opposes it, but I do not think I can accept his view. If the present course was suggested to the plaintiff by anything that happened at the trial, or, if I suspected that his object is to fabricate evidence to meet some point now raised, I should probably refuse leave to amend ; but the case here is far different. The infringement complained of occurred in May 1926 ; the plaint was presented on the 22nd of June 1926. The plaintiff applied for an interim injunction and filed an affidavit on the same date as he presented the plaint, and in that affidavit he makes the following statement :—

"Attracted by the wide circulation commanded by my journal, and actuated *by envy and malice*, the defendant has started on or about the 15th of May, 1926, a Tamil Journal. * * * *"

Can there be clearer proof of the fact that the plaintiff intended from the very outset to allege fraud ? I do not see why I should, in these circumstances, refuse leave. I may mention that the defect was discovered at a very early stage in the course

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of the plaintiff's examination. I am satisfied that the omission to refer to fraud in the plaint is due to an oversight and that in the interests of justice, this amendment ought to be allowed.

It is quite true that an amendment will not be generally allowed for the purpose of adding a plea of fraud, except where strong grounds exist. This test is satisfied in the present case and I allow the plaintiff's application. The defendant shall have liberty to file an additional written statement in two weeks, and the case shall be posted for issues in 17 days from this date.

Costs of this application are reserved.

A. S. V. *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Rama Row and another .. *Appellants** (*Pltfs.* 2 *and* 3)

v.

Somasundaram Asary and others ... *Respondents* (*Defendants*).

Rama Rao v. Somasundaram Asary.

Tresspass—Action of—Prior suit by defendants for declaration of title to land and injunction restraining the plaintiffs from building on it—Order of ad interim *injunction in that suit—Subsequent dismissal of that suit the plaintiffs' title to the land being upheld—Suit by plaintiffs for damages—Failure of plaintiffs to prove want of reasonable and probable cause and malice on the part of the defendants—Plaintiffs if entitled to succeed—Proper form of action—Action "on the case" and not of trespass.*

The defendants instituted a suit against the plaintiffs for a declaration of their title to a strip of ground and for an injunction restraining the plaintiffs from erecting any construction thereon. In that suit the defendants obtained an *ad interim* injunction. Eventually the title to the strip of ground was found in favour of the plaintiffs and the defendants' suit was dismissed. The plaintiffs instituted the present suit for damages for maliciously procuring the *ad interim* injunction.

Held, that the plaintiffs were not entitled to succeed unless they proved want of reasonable and probable cause and malice on the part of the defendants, and that they had no separate cause of action in the nature of a trespass on the ground of the defendants' intereference with their lawful rights to build on their own property.

It is not right to hold that every interference by a court with the person or property of a party at the instanee of another is *prima facie* a trespass by that other unless that other succeeds in proving that he had justification in law. The principle is that, where the interference is by virtue of

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*S. A. No. 58 of 1925. 21st November, 1927.

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a valid or regular order of the Court, the only action which will lie is one "on the case", but, when it is by means of a void order, the proper action is one of trespass.

Bhut Nath v. *Chandra Binode*, (1912) 16 C L J 34, not followed.

Nanjappa Chettiar v. *Ganapathi Goundan*, (1911) I L R 35 M 598 : 21 M L J 1052, followed.

Norendra v. *Bhusan*, (1920) 31 C L J 495 (F. B.), referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in A. S. No. 2 of 1924 (A. S. No. 333 of 1922 on the file of the District Court of Ramnad at Madura), preferred against the decree of the Court of the District Munsif of Paramakudi in O. S. No. 825 of 1920.

T. L. Venkatarama Aiyar and *K. Sankara Sastri* for appellants.

A. V. Narayanaswami Aiyar for respondents.

The judgment of the Court was delivered by

Wallace, J.

Wallace, J. :—The original suit in this case was for damages for maliciously procuring an injunction in a suit on title. In a suit by the defendants against the plaintiffs for a declaration of their title to a strip of ground and for an injunction restraining the plaintiffs from erecting any construction theron, the defendants obtained an *ad interim* injunction which remained in force from 11th January, 1917, till 31st December, 1918. The title to the strip of ground was eventually found in favour of the plaintiffs. Plaintiffs on this filed the present suit. The first Court found the plaintiffs were entitled to damages. The lower appellate court dismissed the suit. The main reason given by the lower Appellate Court was that the plaintiffs had failed to prove want of reasonable and probable cause and malice. Plaintiffs here in Second Appeal do not contest that finding, which is a finding of fact, but contend that, apart from their cause of action on the abuse of the process of the court, to maintain which they admit they are bound to prove want of reasonable and probable cause and malice, they have a separate cause of action in the nature of a trespass on the ground of defendants' interference with their lawful rights to build on their own property, and that the lower Appellate Court ought to have given them a decree on that alternative cause of action, it being unnecessary for such a cause of action to prove want of reasonable and probable cause or malice.

Thus the question argued before us is whether apart from the "action on the case" a separate action for trespass will lie.

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Wallace, J.

On first impression one would have decided that such a suit could not lie since the trespass, if there is a trespass, is not by the party but by the court, and when the court after hearing both parties passed an order which involved an interference with the legitimate rights of a party, he has no cause for damages unless the interference of the court was obtained by an abuse of its process, actuated by malice, and involving want of reasonable and probable cause in which case the action would lie "on the case" and not on the trespass. But our attention has been called to a Full Bench decision of five Judges in the Calcutta High Court, reported in *Norendra* v. *Bhusan* (1), which appears to support a Bench ruling of that court reported in *Bhut Nath* v. *Chandra Binode* (2). In the latter case it was held that an action lies on the footing of trespass on an injunction wrongfully issued by a court against the party who moved the High Court for the injunction, the injunction not being without jurisdiction and there being no proof of malice or want of reasonable and probable cause, the reasoning being that the obtaining of such an injunction was in the nature of a trespass by the mover on the rights of the party restrained. The case before the Full Bench was a case of wrongful attachment of the plaintiff's goods, and before the referring Bench the case in *Bhut Nath* v. *Chandra Binode* (2) was strongly relied upon. The referring Judges in the Full Bench case both doubted the correctness of *Bhut Nath* v. *Chandra Binode* (2), but the Full Bench in a very brief judgment appears to approve or does not disapprove that set of decisions which lay down "that a perosn who unlawfully interferes with the exercise of the property rights of another does an act in the nature of a trespass of property and is liable for damages in an action for trespass," and puts forward *Bhut Nath* v. *Chandra Binode* (2) as an illustration of that class of decisions. The Full Bench referred the case back to the Division Bench. The Division Bench ruling is reported in *Bhusan* v. *Norendra* (3), and that Bench followed *Bhut Nath* v. *Chandra Binode* (2) and held that an action for trespass lay. A ruling of this court which has been relied on by the respondents herein, *Nanjappa Chettiar* v. *Ganapathi Goundan* (4), was referred to before the Division Bench and was put on one side as it was "not regarded as a case of trespass at all."

Now the authority of the Full Bench of Calcutta is of course of great weight, but we are not precluded here from

1. (1920) 31 C L J 495 (F B). 2. (1912) 16 C L J 34.
3. (1920) 32 C L J 236. 4. (1911) I L R 35 M 598 : 21 M L J 1052.

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considering for ourselves the correctness of that decision. As we have said, it contented itself merely with refusing to say that *Bhut Nath* v. *Chandra Binode* (2) was wrong, although invited to do so. We have therefore to consider the correctness of the decision in *Bhut Nath* v. *Chandra Binode* (2). It relies chiefly on an English case, *Clissold* v. *Cratchley* (5). That was a case where a writ of *fi fa* had been taken out by a solicitor to direct the sheriff to levy execution on the plaintiff's goods after the decree under which execution was taken out had been satisfied and therefore after the judgment had come to an end. The learned Judges there held that the judgment being at an end, the writ was without jurisdiction and therefore was null and void, and that the defendant therefore could not justify his interference by pleading any valid order of the court, and therefore he was in the position of a trespasser liable in damages as such. The principle is that where the interference is by way of a valid or regular order of the court the only action which will lie is one "on the case" but when it is by means of a void order the proper action is one of trespass. It appears to us therefore that this decision is no authority for the proposition taken in *Bhut Nath* v. *Chandra Binode* (2). The exact position set out in *Clissold* v. *Cratchley* (5) was adopted by the Calcutta High Court itself in an earlier case in *Bishun Singh* v. *A. W. N. Wyatt* (6). We think the principle which we have deduced from *Clissold* v. *Cratchley* (5) is the correct one. It has been also laid down by Lush, J., in *Smith* v. *Sidney* (7):

> "The authorities distinguish between an act of court and an act of parties and it is only when the proceedings are set aside on the latter ground that the party is made a wrong doer."

It surely would not be right to hold in effect that every interference by a court with the person or property of a party at the instance of another is *prima facie* a trespass by that other unless that other succeeds in proving that he had justification in law. There seems no more reasonable ground for holding this than for holding that any unsuccessful suit brought against a party is a cause of action for damages and that proposition has been repeatedly repudiated by courts of law—see *Norendra* v. *Bhusan* (1), the Calcutta Full Bench decision already quoted, *Bishun Singh* v. *A. W. N. Wyatt* (6), already quoted, and

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1. (1920) 31 C. L. J. 495 (F B). 2. (1912) 16 C L J 34.
5. (1910) L R 2 K B 244. 6. (1911) 14 C L J 515.
7. (1869) L R 5 Q B D 203 at 206.

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the remarks of Bower, L. J., quoted in *Arjun Singh* v. *Mussamat Parbati* (8).

The ruling of this court in *Nanjappa Chettiar* v. *Ganapathi Goundan* (4) is in point. The learned Judges lay down as a well-established rule that

"when the plaintiff's grievance arises directly from the order of a judicial tribunal, though it is moved thereto by a private party, the defendant would not be responsible in damages unless he had acted with malice, as well as without reasonable and probable cause",

that is, the only action maintainable is an action "on the case." No attempt to found an action on trespass appears to have been put forward in that case, nor has it as a matter of fact been put forward as an alternative in the plaint in the present case. We are of opinion therefore that no action lies here on trespass, and that the lower court was right. We therefore dismiss this appeal with costs.

N. S. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Khushaldas Gokaldas and others ... *Appellants** (*Defts.*)

v.

Chimanlal Kalidas and others ... *Respondents* (*Pltfs.*).

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Khushaldas Gokaldas v. Chimanlal Kalidas.

Slip in judgment of lower court—Remedy of aggrieved party.

Where it is alleged that the court below has made a slip in its judgment, the aggrieved party should, before preferring an appeal, call the attention of the lower court† to the slip, so that it might be corrected.

Consolidated Appeal (No. 110 of 1926) from the judgment and two decrees of the High Court, Bombay (MacLeod, C. J., and Crump, J.,), dated the 4th November, 1924, which varied the decree of the Subordinate Judge of Ahmedabad, dated the 27th April, 1923.

The material facts of the case appear in the judgment of the Judicial Committee.

Lowndes, K. C., and *Parikh* for appellants.

De Gruyther, K. C., and *Dube* for respondents.

The judgment of their Lordships was delivered by

Viscount Sumner.

VISCOUNT SUMNER :—It is with a sense of satisfaction that it is not always possible to feel that the Board has come to a conclusion in this case.

4. (1911) I L R 35 M 598 at 602 : 21 M L J 1052.

8. (1922) I L R 44 A 687 at 689.

*P. C. Appeal No. 110 of 1926. 28th November, 1927.

†See S. 152 and O. 47 of the Civil Procedure Code, 1908—K J. R.

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Viscount Sumner.

The appeals are brought by special leave of His Majesty in Council granted some time ago. Down to last Friday, when this case was called on, the opinion of the Board was sought to all appearances upon a large number of questions which were said to involve, and probably did involve, questions of some importance, because they concerned the construction of a running contract between the plaintiffs and the defendants, a contract which is quite probably similar to many others between other parties.

From the commencement of the argument, however, the points involved in the appeals were dropped in the order of their importance, until at last the only point left, which is really capable of much discussion, involves a sum of about Rs. 1,500 only, and turns upon the question, whether the High Court made a slip in stating that the second suit was brought in time instead of saying that, as regards the first year for which the claim was made, it was a few weeks out of time.

The cause of action arises between agents to a cotton spinning company, who managed its affairs and are its secretaries and treasurers, and the plaintiffs, who, for consideration which it is not necessary to enquire into, were given under an agreement a share in the commission earned by the defendants and payable to them by the Company. The fact that they managed the Company and paid themselves by making entries in the books, does not in the least affect the question. It was on their sales that the Company was bound to pay the defendants, and out of the commission so payable the defendants bound themselves to make payments to the plaintiffs. The agreement, which is Exhibit 60, refers to "the commission payable to us under Clause 7 of the memorandum and Clause 34 of the Articles of the Company." When one refers to the terms of this agreement with the Company and the amended Articles, it appears that their commission was earned at fixed rates upon the weight of yarn and cloth manufactured and sold varying with the quality. It is said, therefore, that the commission which the defendants earned and which the plaintiffs were entitled to share was quite irrespective of the profit on working, which the Company might earn or not earn, and is ascertainable the moment it could be ascertained what quantity of goods of the various kinds had been manufactured and sold, for then it could be quantified by a simple calculation upon that footing. There is, however, a provision in the Articles which regulates the rate of the defendants' commission as against the Company, which qualifies this. Article 34 contains a schedule which sets out the terms of the

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agreement, and paragraph 4 is the paragraph in question. It says :—

"But if in any year the nett income of the Company happens to be less than 6 per cent. on the paid-up capital of the shareholders, then in that year the agents shall give up an amount up to one-third share of their commission in order to make up that much amount in that year. But in no case shall they give more amount than one-third share of their commission in order to make up that amount. The account in respect of the commission of the agents shall be calculated at the end of the month and shall be credited to their account."

On the true construction of that paragraph their Lordships think that, although the agents might be entitled to credit themselves in the books month by month with the amount of commission earned by them, that would necessarily be a provisional credit, which cannot become definite and final until it has been ascertained whether the nett income of the Company is less than 6 per cent. on the paid-up capital of the shareholders or not. There is no evidence to show on what materials or what date that could be ascertained at the earliest. There is no ground for thinking that the circumstances could be ascertained on the last day of the calendar year, and as no discussion arose below on the point and the course of business eventually was to take that ascertainment as happening when the Company held its general meeting and passed its account and not before, their Lordships think that upon this construction no sum was payable by the defendants to the plaintiffs, so that a cause of action could arise for non-payment until that outstanding matter had been decided at the ensuing annual general meeting and what had hitherto been provisional had become certain. On that ground, therefore, the plea of limitation, which has been raised with regard to all the years dealt with in the two actions, fails except for a point which relates only to the first year in the second action, the year 1918. In that year, according to the copy of the notice sent out for the general meeting, which is in the record, the meeting was summoned to take place in the month of May*. The month of June, 1922, was that in which the second action was commenced, and accordingly it is said that the action is by a month or so too late, because there is the announcement of the date of the annual general meeting, and three years from that would have expired shortly before the writ was issued in the second action.

It is also suggested that there is error on the part of the High Court, who failed to notice this date and gave judgment,

* That is to say, May, 1919. The general meeting to which accounts for the year 1918 were submitted was held in May, 1919.—*K. J. R.*

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as they should not have done, to that extent in favour of the defendants.

The facts as to that are short. The matter did not arise for mention in the judgment of the first Court. In the High Court there is a distinct statement by the Judges that in both actions the writs were issued in time, and this was said with the document in question before them. What cause is there for supposing that they were wrong in that? It is said there was no evidence to the contrary, and the evidence, such as it is, of the summons to the meeting is exhibited. If, however, the meeting was not actually held on that day or the resolution was not passed and the meeting was not concluded in that day, although there is no record of it in the proceedings, then there was material or there might have been material before the High Court which would justify their conclusion. Their Lordships are not obliged to allow these appeals because no one has been able to point out what was the actual admission or evidence which was before the High Court on the subject. That there was some admission or some such evidence, which justified them, is a reasonable assumption, because, first of all, if there was any slip, it was the duty of the defendants to have called the attention of the court to it, so that it might be corrected. Again, it was in their interest to have drawn attention to it when they applied for leave to appeal to His Majesty in Council, as they did some time afterwards in most voluminous and exhaustive terms, but there is no mention of this point there, and when, lastly, a petition was sent to this country with instructions to apply for special leave to appeal, this point was not mentioned at all either one way or the other, and it was only by the diligence of the Counsel who appeared that this discrepancy was observed and naturally made legitimate use of on the application. The Board are much obliged to Sir George Lowndes for giving them this candid information. The inference that their Lordships draw is this: It was known, for some reason which is not now before the Board, that the High Court had the material before it which was required, and therefore that its decision upon this point was right. The amount involved would only have been about Rs. 1,500, and if that alone had been brought before their Lordships when special leave to appeal was asked for, the leave certainly would not have been given. The other points there mentioned have now disappeared. Again, with a candour for which their Lordships are much obliged to Counsel, the contentions that there had been an offer only but no concluded contract, and

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that the respondents (plaintiffs) had never given the help that they contracted to give, which was a condition precedent to their right to be paid, were abandoned at the outset, and another and a new point that the defendants had never signed this document was also abandoned. Thus the case was brought down to the argument on limitation, and that again has been brought down to the year 1918. In their Lordships' opinion even that point vanishes.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitor for respondents : *H. S. L. Polak.*

K. J. R. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

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Musa Miya v. Kadar Bax.

Musa Miya Walad Mahamad Shaffi and another ... *Appellants** (*Defts.*)

v.

Kadar Bax Walad Khaj Bax, since deceased, and another ... *Respondents* (*Pltfs.*).

Mohammedan Law—Gift—Validity—Delivery of possession or relinquishment of control over property by donor—Necessity—Maternal grand-father—Gift to daughter's minor sons by—Necessity in case of—Father of minors alive and not deprived of his guardianship—Effect.

The exception made by the Mohammedan Law, in the case of a gift to a minor by his father or other guardian, to the rule requiring that a gift should be accompanied by delivery of possession, ought not to be extended.

Where the father and natural guardian of two Mohammedan minors was alive and was in a position to exercise his rights and powers as a parent and guardian and to take possession of property gifted to his children on their behalf, *held,* that the maternal grand-father of the minors could not be held to be their guardian within the meaning of the exception, merely because the maternal grandfather, being a man of property and able and willing to support in his own house his daughter, her husband and family, allowed them to live in his own house, maintained them, if not entirely, at any rate, to a large extent, and maintained and brought up the minors from the time of their birth until his death, and that a gift by him (the maternal grandfather) to the minors was, therefore, not complete without delivery of possession or relinquishment of control over the property by the maternal grandfather.

Appeal (No. 104 of 1926) from a judgment and decree of the High Court, Bombay (MacLeod, C. J., and Crump, J.), dated the 6th December, 1923, varying a judgment and decree,

*P. C. Appeal No. 104 of 1926. 21st February, 1928.

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dated the 18th July, 1921, of the Court of the First Class Subordinate Judge of Dhulia.

The facts of the case appear sufficiently from the judgment of their Lordships.

In the Court below, Crump, J., in concurring with the learned Chief Justice that there was no valid gift under Mohammedan Law, made the following pertinent observations :

"I desire to add a few words as regards the decision in *Fakir Nynar Muhamed Rowther* v. *Kandaswami Kulathu Vandan* (1), on which reliance was placed as supporting the validity of the gift in this case. The facts of that case, put shortly, were that a cerain Mohammedan lady executed a deed of gift in favour of her paternal grandson, and the said deed recited that she remained in possession as guardian on behalf of the donee who was then a minor."

"Now if it be correct to say that that is a valid gift according to Mohammedan Law, nevertheless the facts necessary to make that decision applicable are not made out in the present case. Here there is no plain and unequivocal expression on behalf of the donor that he retained possession as *de facto* guardian on behalf of his minor grandsons. It would have to be argued that such an intention could be gathered from the letters written by him, and from the oral evidence in the case. But there is really no circumstance from 1913 down to the death of the donor from which it can be concluded that he had ever expressed any such intention in unequivocal terms. There were various occasions on which, if he indeed regarded himself as a *de facto* guardian in possession on behalf of his grandsons, he must, and could have given effect to that intention. Therefore on the facts of this case, I am of opinion that in this aspect also the gift in this case cannot be held to be validated".

Sir George Lowndes, K. C., and *Parikh* for appellants.

The respondents were not represented at the hearing.

Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON :—This is an appeal by Musa Miya Walad Mahamad Shaffi, a minor, and Isa Miya *alias* Mahamad Ismail Khan Walad Mahamad Shaffi, who were defendants 18 and 19 in the suit, against the judgment and decree, dated the 6th December, 1923, of the High Court of Bombay, which varied the decree of the learned Subordinate Judge who tried the suit.

The suit was brought on the 6th January, 1919, by Kadar Bax Khaj Bax, who is now dead ; his representatives are the first respondents in this appeal.

The plaintiff claimed as one of the heirs under Mohammedan law of one Abdul Rasul, a Sunni Mohammedan, a three-eighth share of the properties scheduled in the plaint and left by the said Abdul Rasul, who was his brother. He alleged that Abdul

1. (1909) I L R 35 M 120.

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Rasul died, leaving him surviving as his heirs a widow, Sahebjan (who was the first defendant, and who is now dead), a daughter, Rahimatbi (who was the second defendant and who is the second respondent in this appeal), and his brother, the plaintiff : that according to Mohammedan law the widow was entitled to one-eighth, the daughter to one-half, and the plaintiff to three-eighths; he alleged that the widow and the daughter and their tenants (defendants 3 to 17) were in possession of the above-mentioned property.

The widow and the daughter filed a joint written statement stating that in 1910 Abdul Rasul gave all his properties to his grandsons the appellants, who are the sons of his daughter Rahimatbi, under an oral gift, and informed their father, Mahamad Shaffi, of the same by a letter ; that the grandsons were from their birth brought up by Abdul Rasul and lived with him ; that on the 18th April, 1911, Abdul Rasul wrote another letter to Mahamad Shaffi informing him that the writer's grandsons should be the owners of his property after his (Rasul's) death ; that the letter constituted the will of Abdul Rasul ; that by virtue of the oral gift or in the alternative of the will, the grandsons have become owners of Abdul Rasul's property ; that the grandsons through their father were in possession of the property ; and that the plaintiff was not entitled to any relief.

The tenants (defendants 3 to 17) did not appear and are not parties to this appeal.

The appellants (defendants 18 and 19) were made parties to the suit on their own application. By their joint written statement they denied the right of Abdul Rasul's heirs to recover any part of his property, and supported the pleas raised by their grandmother and mother with regard to the gift and the will. They further stated that even after the gift they (the appellants) continued to live with their grandfather who managed the properties given to them, that their grandfather believed that his possession was for and on behalf of his minor grandsons, and that the gift to them was valid under Mohammedan law. In the alternative, they pleaded that the letter of the 18th April, 1911, from Abdul Rasul to their father constituted a will in their favour under Mohammedan law.

The plaintiff, in reply, denied that there was any valid gift or will, and contended that the letters in support of the gift or will were not genuine.

The learned Subordinate Judge held that there was no valid gift in favour of the defendants 18 and 19. He however

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held that the letters, Exhibits 122 to 126, when read together, expressed an intention on the part of Abdul Rasul that his grandsons, the defendants 18 and 19, should have his property after his death, and that they constituted the will of Abdul Rasul. He decided that the will was invalid according to Mohammedan law for more than one-third of the property of the testator unless the heirs consented thereto after the death of the testator ; he held that the defendants Nos. 1 and 2, viz., the widow and the daughter of Abdul Rasul, had given their consent, and consequently he made a decree in favour of the plaintiff for one-fourth share of the moveable and immoveable property specified in the decree ; he directed a partition, and held that the defendants 18 and 19 were entitled to the remaining three-fourths' share.

Both the defendants 18 and 19 and the plaintiff appealed to the High Court against the learned Subordinate Judge's judgment.

The two appeals were heard together.

The High Court dismissed the appeal presented by the defendants 18 and 19 and allowed the plaintiff's appeal to the extent that in substitution for the decree passed by the Trial Court the High Court declared that the plaintiff was entitled on partition to a three-eighth share in the property left by Abdul Rasul, with the exception of certain property mentioned therein, to which it is not necessary to refer in detail.

The learned Judges came to the conclusion that the letters upon which the learned Subordinate Judge relied did not constitute a will of Abdul Rasul.

The learned counsel who appeared for the appellants in this appeal stated that he was not able to support the learned Subordinate Judge's judgment in respect of the will, so that the only point relied on in this appeal was that there was a valid gift by Abdul Rasul to his grandsons on or about the 1st October, 1910, *viz.*, on the occasion when he is alleged to have given a feast and made an announcement of the gift of his property to his grandsons.

The question is still further narrowed, because the learned counsel agreed that there are concurrent findings of fact by the two Courts in India that there was no transfer of possession of the property by Abdul Rasul to his grandsons, defendants 18 and 19, or to any one on their behalf, and the learned counsel did not dispute these findings.

The learned counsel, however, argued that in view of the facts of this case and the relationship between Abdul Rasul and his grandsons, the gift was complete without any transfer of possession, according to Mohammedan law, and that the possession and management by Abdul Rasul after the gift was on behalf of his grandsons.

Their Lordships have not had the advantage of hearing counsel on behalf of the respondents, but they are indebted to the learned counsel who appeared for the appellants, for drawing their attention to the evidence and to all the points which were material, whether they would weigh against or for the argument which the learned counsel presented.

There is no doubt that the case has to be decided according to Mohammedan law, and that the chapter on gifts in the Transfer of Property Act, 1882, is not applicable, *see* S. 129.

Their Lordships are of opinion that a correct statement of the law on the question under consideration is to be found in the material clauses of chapter V of Macnaghten's "Principles and Precedents of Mohammedan Law," published in 1825. They are as follows :—

"(1) A gift is defined to be the conferring of property without a consideration.

"(2) Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

"(4) It is necessary that a gift should be accompanied by delivery of possession and that seizin should take effect immediately or at a subsequent period by desire of the donor.

"(8) A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

"(9) The case of a house given to a husband by a wife and of property given by a father to his minor child form *exceptions* to the above rule.

"(10) Formal delivery and seizin are not necessary in the case of a gift to a trustee having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient."

The statement of the law in Macnaghten's "Principles and Precedents of Mohammedan Law" was approved by the Judicial Committee in *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (2) and, after referring to the statement of the law made by the High Court, their Lordships stated that:—

"Where there is on the part of a father or other guardian a real and *bona fide* intention to make a gift, the law will be satisfied without change of

2. (1875) L R 2 I A 87, at p. 104.

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possession and will presume the subsequent holding of the property to be on behalf of the minor."

The defendants 18 and 19, grandsons of Abdul Rasul, were minors at the time of the alleged gift, and the real question in this appeal is whether the facts of this case bring it within the above-mentioned exception; for, as already stated, the appeal has to be decided upon acceptance of the finding that there was no delivery of possession of the property by Abdul Rasul to his grandsons, and that there was no relinquishment of control by Abdul Rasul over the said property until his death.

The material facts of this case are as follows :—Abdul Rasul was an officer in the Forest Department; he retired about 14 or 15 years before the trial of the suit, which was heard in 1921. His only daughter, Rahimatbi, the mother of the defendants 18 and 19, lived with her father, Abdul Rasul, even after her marriage with her husband, whose name is Mahamad Shaffi.

It appears from the evidence of Mahamad Shaffi that, although he owned some lands at a place called Shahada, he was generally living with Abdul Rasul, and only occasionally at Shahada, and their Lordships think it must be taken as a fact that Rahimatbi, her husband Mahamad Shaffi, and her two children, the defendants 18 and 19, lived in the house of Abdul Rasul at one place or another, and that they were maintained by Abdul Rasul, if not entirely, at any rate, to a large extent.

In 1910, Abdul Rasul decided to make a pilgrimage to Mecca, and it is the case of the appellants that on the 1st October, 1910, *viz.*, on the occasion of the 26th day of Ramzan, Abdul invited several persons to dinner, and that after the dinner he announced to the persons then assembled that, as he was going to Mecca, he had made a gift of his property to his two grandsons and made them the owners thereof, that this announcement was made known to the ladies of the household at Abdul Rasul's request, that Mahamad Shaffi was then at Shahada, and that Abdul Rasul wrote to him and informed him that "now both the children, Essen Mian and Moosa Mian, are the owners of my property."

There was no mutation of the names and no deed was executed.

Abdul Rasul was away on pilgrimage about three months and returned in January, 1911. On his return, Abdul Rasul resumed the management of his property; the lands had been previously let to tenants, and apparently there was little, if anything, to be done in respect thereof in his absence.

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Certain lands which belonged to Abdul Rasul had been purchased for him in the name of his brother, and in September, 1913, two deeds of conveyance were executed and the property specified therein was conveyed to Abdul Rasul.

The learned Judge pointed out that :

"though there were several occasions on which Abdul Rasul could have put forth the ownership of the boys, he does not seem to have availed himself of any of them."

The correctness of this finding was not disputed by the learned counsel for the appellants.

Abdul Rasul died at Chopda in June, 1918, and it must be taken as a fact that after his return from Mecca in January, 1911, he remained in possession of the property and managed it until his death.

Their Lordships' attention has not been drawn to any evidence which would go to show that during that time Abdul Rasul in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf.

The suit was brought in January, 1919.

The learned Judges of the High Court seem to have been of the opinion that there was no actual gift, though Abdul Rasul had expressed an intention to make a gift of the property to the grandsons.

The learned Judge, who tried the case however, was apparently of opinion that Abdul Rasul had made the above-mentioned announcement of gift, but that the gift was not complete as there was no delivery of possession.

Though not deciding the point, their Lordships are of opinion that it may be assumed for the purposes of this appeal that Abdul Rasul did announce, on the 1st of October, 1910, to his assembled friends that he had made a gift of his property to his grandsons.

The question remains whether, in the absence of any delivery of possession or any relinquishment of control by Abdul Rasul, that was sufficient to constitute a complete gift according to Mohammedan law. In other words, do the above-mentioned facts bring this case within the exception to the general rule, which has been hereinbefore referred to.

Their Lordships are of opinion that they are not at liberty to extend the exception, and giving to the words thereof their natural meaning they are of opinion that this case is not within the exception.

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It is not a case of a gift by a father or mother to a minor; nor is it a case of a guardian making a gift to his charge or charges. It is true that Abdul Rasul seems to have maintained and brought up his grandsons from the time of their birth until his death; but during that time the father and mother of the two minors were also living with Abdul Rasul, with occasional visits by the father to his own land.

It is obvious that Abdul Rasul was a man of property and able and willing to support in his own house, his daughter, her husband and family.

Their Lordships are unable to hold that those facts are sufficient to constitute Abdul Rasul a guardian within the meaning of the exception, so as to make a gift by him to them complete without any delivery of possession or relinquishment of control over the property by him.

Considerable reliance was placed by the learned counsel for the appellants on Case XIX, Q. 2, R. 2, in the Precedents of Gifts given by Macnaghten in the 1825 edition.

In that case a reference is made to the Hidaya which runs as follows :—

> "If a father make a gift of something to his infant son, the infant by virtue of the gift becomes proprietor of the same provided, etc. The same rule holds when a mother gives something to her infant son whom she maintains and of whom the father is dead and no guardian provided, and so also with respect to the gift of any other person maintaining a child under these circumstances."

In their Lordships' opinion this precedent does not support the appellants' case; on the contrary, it seems to be against their contention.

The rule applies to the case of a mother making a gift to her infant son whom she maintains *only* when the father is dead and no guardian has been provided.

The rule applies also to the gift by any other person maintaining a child *"under these circumstances," i.e.*, when the father is dead and no guardian has been provided. This seems to imply that when the father, who is the natural guardian of his infant children, is alive and has not been deprived of his rights and powers of guardian, the above-mentioned rule will not apply.

At all events it may safely be said that the conditions contemplated in the aforesaid rule cannot be found in this case, because the father of the minors was alive, and was actually living with his wife and children in the house of Abdul Rasul, and was in a position to exercise his rights and powers as a parent

and guardian, and to take possession of the property on behalf of his children.

It was not denied that if the alleged gift by Abdul Rasul to the grandsons was not complete according to Mohammedan law, the share decreed by the High Court to the plaintiff was correct.

For these reasons their Lordships are of opinion that the appeal should be dismissed, that as there was no appearance for the respondents no order for costs should be made, and they will humbly advise His Majesty accordingly.

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Solicitors for appellants : *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Krishnaswami Naidu ... *Appellant* (Petitioner—Assignee-Decree-holder)*

v.

Karuppan Chettiar and others .. *Respondents (Defendants Nos. 1 to 3, L.Rs. of 4th Defendant and original decree-holder).*

Krishnaswami Naidu v. Karuppan Chettiar.

Decree-Company—Decree in favour of—Transfer by liquidator of, before dissolution—Writing given for transfer by liquidator after dissolution—Validity of—Objection by judgment-debtor to—Maintainability—Decree—Assignment of—Writing—Necessity.

The liquidator of a company can, after its dissolution, give a transfer in writing for a decree which had transferred before its dissolution. Even if there is any irregularity in his giving such a writing, it is not open to a person in the position of a judgment-debtor to complain of it.

A decree is not an actionable claim and an assignment of it need not be in writing.

Appeal against the order of the District Court of Coimbatore, dated 17th November, 1924, and made in Civil Appeal No. 117 of 1924, preferred against the order of the Court of the Principal District Munsif of Coimbatore, dated 11th February, 1924, and made in C. M. P. No. 871 of 1923 in Original Suit No. 559 of 1916.

V. Narasimha Aiyangar for appellant.

T. M. Krishnaswami Aiyar and *M. Krishna Bharati* for respondents.

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*A. A. A. O. No. 49 of 1925. 30th November, 1927.

Krishnaswami Naidu v. Karuppan Chettiar.

The Court delivered the following

JUDGMENT :—The decision in *Ramachandra Rao* v. *Kandasami Chetti* (1), cited by the court below, and those relied on in it, *In re Pinto Silver Mining Company* (2) and *In re London and Caledonian Marine Insurance Company* (3), as well as other cases show that when a company has been dissolved it ceases to exist for all purposes and its officers are *functus officio;* that a liquidator is also an officer of the company and becomes *functus officio.* Vide *Re The Westbourne Grove Drapery Co., Ltd.* (4) and *Coston* v. *Gorst* (5). But assuming that it is so, the question still arises whether he cannot complete a formal act like giving a transfer in writing for a decree which has been already transferred.

In the present case, the decree was transferred by auction on 1st February, 1922, when the company was not dissolved. It has been held in *Afzal* v. *Ram Kumar Bhudra* (6), *Dagdu* v. *Vanji* (7) and *Govindarajulu Naidoo* v. *Ranga Rao* (8), and we see no reason to depart from the view adopted by these decisions, that a decree is not an actionable claim within the meaning of the Transfer of Property Act and therefore an assignment of a decree need not be in writing. It follows that the assignment was valid and complete. But for purposes of execution under the Civil Procedure Code, O. XXI, R. 16, requires the transfer to be in writing. This writing has since been given by the original transferor after he has ceased to be liquidator. There is nothing in the Companies Act, or in the decisions on it which prohibits him from doing so, or which compels us to regard it as void, seeing that the original transfer was effected by him at a time when he was liquidator. Whatever looseness or irregularity there may be in such a procedure, neither the company nor its share-holders complain of it, and we do not see how a person in the position of a judgment-debtor should be allowed to do so.

The result is that the application of 2nd July, 1923, was a proper application and, though not re-presented immediately after having been amended, was a step-in-aid for execution.

The present application is therefore in time. The appeal is allowed with costs here and in the lower appellate court. The appellant will be permitted to proceed with the execution of the

1. (1895) I L R 18 M 498.
2. (1877) L R 8 Ch. D. 273.
3. (1878) L R 11 Ch. D 140.
4. (1878) 39 L T (Eng.) 30.
5. L R (1891) 2 Ch. 73.
6. (1886) I L R 12 C 610.
7. (1900) I L R 24 B 502.
8. (1920) 40 M L J 124.

decree in accordance with law. Costs in the first court will abide the result

A. S V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE SRINIVASA AIYANGAR.

Alluri Timmaraju ... *Appellant* (Plaintiff)*

v.

Alluri Narasimha Raju and another ... *Respondents (Defts. 6 and 7).*

Timmaraju *v.* Narasimha Raju.

Civil Procedure Code, 1908, O. 20, R. 12—Mesne profits—Application for ascertainment of—Non-payment of additional batta required for serving notice of—Dismissal of application on ground of—Power of Court—S. 151, Civil Procedure Code—Order on application merely recording "Dismissed"—Effect—Decree holder's right to proceed with application.

A suit for possession, which was dismissed by the Munsif, was decreed on appeal. Within three years of the date of the appellate decree, the plaintiff applied under O. 20, R. 12 of Civil Procedure Code, for the determination of mesne profits. He paid batta, but service of notice was not effected, and, on his failure to pay additional batta, the court dismissed the application, merely recording "Dismissed"

Held, that plaintiff's application should nevertheless be treated as subsisting and that the plaintiff was entitled to proceed upon it.

Per Jackson, J :—If a decree-holder makes an application for the ascertainment of mesne profits, but does not pursue it by paying additional batta, the court can dismiss the application only under S. 151 of Civil Procedure Code, stating expressly that it purports to act under that section and the circumstances which it considers sufficient to warrant its acting under it.

Mere failure to comply with R. 24 of the Civil Rules of Practice is not in every case an abuse of process; but the court may, in the circumstances of a particular case, consider it as amounting to an abuse.

Where the court merely records on the application "Dismissed" it is not the only possible inference that it acts under S. 151, Civil Procedure Code.

If, in order to exercise discipline and check neglect and delay, a court thinks it incumbent upon itself to dismiss the application, it should call upon the party to show cause, and then pass a considered order of dismissal.

The dismissal of the application by the court below is not such a dismissal as can render that application inoperative.

Per Srinivasa Aiyangar, J. :—The court has power to dismiss an application by the decree-holder for the ascertainment of mesne profits for non-payment of the batta directed to be paid for the purpose of serving the notice of the application.

The scheme of the Code is that an order for the payment of mesne profits thereafter to be ascertained is in the nature of a preliminary decree

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*S. A. No. 134 of 1925. 19th December, 1927.

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and that the final decree has to be passed on such ascertainment being completed. The suit must therefore be regarded as pending till the final decree is passed.

Assuming that an application for the ascertainment of mesne profits is a condition precedent, on such an application being made within the period allowed, the court is under a duty to ascertain the profits as in the case of any other pending suit. There can be no final disposal of the suit until the profits are ascertained and a final decree is passed.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 31 of 1924, preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in C. M. A. No. 1097 of 1922 in Original Suit No. 8 of 1917.

G. Lakshmanna for appellant.

P. Somasundaram for respondent.

The Court delivered the following

Jackson, J.

JUDGMENTS :—*Jackson, J.* :—Plaintiff sued for possession with mesne profits The Additional District Munsif of Rajahmundry dismissed his suit. The Appellate Court decreed the suit on 3rd February, 1919. On the 30th November. 1921, the plaintiff put in an application under O. 20, R. 12, for the determination of mense profits. He paid batta, but service of notice was not effected, and, on his failure to pay additional batta, the court dismissed the application. He applied again on 6th December, 1922, more than three years after the date of the Appellate Court decree. The question for determination is whether plaintiff is not now debarred from having the mesne profits ascertained.

There can be no doubt that the application of December, 1922, is an application within the scope of Article 181 of the Indian Limitation Act, and, being three years subsequent to the time when the right to apply accrued, it is clearly barred.

But the application of November, 1921, was within time and it is not so clear that plaintiff may not even now treat it as effective.

Under O. XX, R. 12, a statutory obligation is laid upon the court to inquire into mesne profits and pass a final decree on the application of the decree-holder. Can the court avoid this obligation if the decree-holder makes the application, but does not pursue it by paying additional batta? There is no provision in the Code of Civil Procedure for dismissing an application closing the proceedings in such or similar circumstances. R. 24, Civil Rules of Practice, provides that, within seven days from the admission of any proceeding in respect of which notice is to be issued by the court to any person, the party shall bring into court the stamped application for service.

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It is not, however, laid down what shall happen if the party fail to do so. If the court then dismisses the application, it can only be said to do so by virtue of S. 151 of the Code of Civil Procedure for the ends of justice or to prevent abuse of its process. If in these circumstances, a court deliberately passed proceedings under S. 151, Code of Civil Procedure, pointing out how the ends of justice or its own process were safeguarded, it might be hard to say that it acted without propriety or jurisdiction. But when a court merely records "Dismissed" and leaves it to be inferred whether it was or was not acting under S. 151, it can hardly be assumed that the only possible inference is in the affirmative.

In this connection the observations in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1) are pertinent. In that case a suit had been remitted to the court of first instance in order that necessary steps might be taken not for ascertaining mesne profits but to effect a partition already decreed. The Subordinate Judge fixed a day for hearing; the plaintiff failed to appear and the suit was dismissed "for want of further prosecution". The Subordinate Judge explained this dismissal as meaning "the decree is certainly in existence, but the plaintiff is not entitled to further relief in the present litigation". Upon this the Judicial Committee observes :

> "He puts the plaintiff into an intolerable position, not able to go on with his suit, and yet not in a position to bring a fresh suit. Their Lordships are fully sensible of the necessity of leaving the Judges in India with ample power of discipline and means to check neglect and delay. If, for instance, the Subordinate Judge had made an order adjourning the proceedings *sine die*, with liberty to the plaintiff to restore the suit to the list on payment of all costs, it would have been a perfectly proper order. But the order was made without jurisdiction and was rightly set aside by the High Court."

Of course this case is not precisely upon all fours with the one before us. The Subordinate Judge dismissed a suit which he had no jurisdiction to dismiss ; which does not necessarily imply that he would have no jurisdiction to dismiss an application for failure to pay batta. But the spirit of the ruling would seem to be that a court is not justified in depriving a party of the benefits of his decree, on the bare ground that he has failed to comply with some rule of procedure. It cannot be argued that the order of dismissal involves no deprivation, because on the next day the party, assuming that the three years have not elapsed, can put in a fresh application. In the same way it

1. (1924) L. R. 51 I A 321 : I L R 4 Pat 61 : 47 M L J 441 (P. C.)

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was suggested in the Privy Council case that the dismissal was merely *in terrorem*, and a petition for restitution would have reopened the proceedings. But this argument did not commend itself to their Lordships presumably because an order which is bad in itself cannot be called good because it is liable to be reversed or negatived. It must be considered on its own merits Can it be said that if it were passed on the last day before limitation set in it would be bad; but if on the penultimate day, thus giving the party a chance to file a fresh application, it would be good? Obviously not.

Therefore for the purpose of the argument it must be assumed that the order of dismissal was final, and the question is whether the court had any right to make such an order. The Code of Civil Procedure and the rules framed under the Code of Civil Procedure give it no such right in terms. S. 151 can only give such right if the court find that it is necessary to act for the ends of justice or to prevent abuse of its process. As the Judicial Committee points out the ends of justice are not served by depriving a party of the fruits of his decree. If the court purports to prevent an abuse it must find what the absue is. Mere failure to comply with R. 24 of Civil Rules of Practice is hardly in every case an abuse of process, but, if the court considers that it does amount to an abuse, it must find to that effect. S. 151 is not a general clause validating every act of a court which cannot otherwise be justified. It is a section allowing a court to exercise its power in specified circumstances, and it cannot exercise that power until those circumstances are established.

As against this view it may be said that unless a court have power of summary dismissal on failure to comply with the mandatory provision of R. 24, that rule becomes of no effect. This does not follow. The order indicated by the Judicial Committee in the passage quoted above is one of adjournment *sine die*, but such order is deprecated in R. 71, Civil Rules of Practice. If in order to exercise discipline and check neglect and delay a court thinks it incumbent upon itself to dismiss the application, it should call upon the party to show cause, and then pass a considered order of dismissal.

It cannot pass an unconsidered order of dismissal leaving it to be inferred firstly that there were circumstances which would warrant its acting under S. 151, and secondly that it did so act.

I should find therefore that the dismissal of the application of November, 1922, is not such dismissal as can render that

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application inoperative and plaintiff is entitled to proceed upon it. I would mulct plaintiff in costs throughout, for, the difficulty has arisen entirely through his own neglect. The order of the lower appellate court is set aside. The Execution Petition should be disposed of according to law. The respondents will get their costs throughout.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree to the order proposed by my learned brother that the appeal should be allowed and that the application for ascertainment of profits made by the decree-holder on the 8th of October, 1921, should, for the purpose of such ascertainment, be treated as still subsisting and that the District Munsif's Court should now proceed to determine the mesne profits.

It seems to me however that the order of the lower appellate court can be regarded as unsustainable, not on the ground that the last application for the ascertainment of the mesne profits, dated 6th December, 1922, may be regarded as a mere continuation of the previous petition for the same, nor on the ground that the court has no power to dismiss an application because the batta directed to be paid for the purpose of serving the notice of the application has not been complied with, but on a more fundamental ground altogether.

It is possible that, in enacting amendment to R. 12 of O. 20 by way of addition of clause 3 thereto, the rule-making authority intended that there should be always an application by the decree-holder for the ascertainment of mesne profits where such ascertainment had been directed even by the very court that has to ascertain it. But I am not satisfied that the language of R. 3 is sufficiently apt for that purpose. That clause itself speaks of a final decree being passed and it is clear that the scheme underlying the provision is that the direction for the order for the payment of mesne profits thereafter to be ascertained is in the nature of a preliminary decree and that the final decree has to be passed on such ascertainment being completed. If so, such a scheme clearly imports and necessarily implies the suit itself being regarded as pending till the final decree is passed. This again would necessarily imply that there can be no final disposal of the suit itself till a final decree comes to be passed in the suit I consider however that, if it was contemplated that in every case before a court proceeds to ascertain the mesne profits, there should be an application by the decree-holder, much clearer language for that purpose should have been used. But the rule runs thus :

"Where the Appellate Court directs such an enquiry, it may direct the court of first instance to make the enquiry ; and in every case the court

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of first instance shall, on the application of the decree-holder, inquire and pass the final decree".

The whole thing is made into one sentence. If really the proper meaning of the latter part of this rule is, as it must be, that the expression "in every case" relates to the case of appellate court ordering the ascertainment of mesne profits and also the court of first instance ordering such ascertainment, the latter part should have been constituted into a separate grammatical sentence. The latter part of that rule, as it stands, if it should be regarded as referring to every case, must also be properly held to cover cases in which the appellate court itself directs an enquiry into the mesne profits to be made by itself. In such a case it seems to me that this part of the rule referring to the court of first instance would be not only meaningless but wrong However, without being very meticulous about grammar we should assume that the rule refers only to cases where the duty is cast on the court of first instance to ascertain mesne profits. When the rule says that the court of first instance shall, on the application of the decree-holder, enquire and pass the final decree, the language is apt only for the purpose of indicating that on such application being made the obligation is peremptorily cast on the court of first instance to do so. It is one thing however to say that on a condition being satisfied, a peremptory obligation is cast, and another thing altogether to state that the condition is imperative.

In my view therefore if the true intention of the rule-making authority was that, in every case where the court of first instance has to ascertain mesne profits, there should be an application made to it before the decree-holder can be entitled to require such ascertainment to be made, the language should be revised and amended. However, assuming for the purpose of the present argument that such an application is really in the nature of a condition precedent, then it would follow that, on such an application being made within the period of limitation prescribed by the Limitation Act, the condition is satisfied and therefore the obligation is cast. It is possible that such an application was regarded as necessary because in cases in which the appellate court directs the enquiry to be made by the court of first instance, such a direction should naturally be required to be brought to the notice of the court of first instance and that can only be by an application by the decree-holder. But having regard to the scheme otherwise of the provisions when there is a preliminary decree for ascertainment of mesne profits and a final decree has to be passed, there is no reason to suppose

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that the application should be regarded as if that were the proceeding for the ascertainment of mesne profits. The mesne profits come to be ascertained not because of the application but because of the direction to ascertain the same for the purpose of final decree. According to the proper language of the rule, the making of the application can, if at all, be regarded only as a condition precedent.

I am therefore of the opinion that on the making of the application the condition laid down in the rule is satisfied and the obligation comes to be cast on the court of first instance to ascertain the mesne profits and it is then for the court to proceed to ascertain mesne profits as in the case of any other pending suit. I do not however consider that it is necessary for the purposes of the present case to pursue the discussion of this matter further, as, in the result, I have agreed with my learned brother.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Gopalakrishnaswami Naicker ... *Petitioner** (*Petitioner*)

v.

V. Srinivasa Aiyangar and others ... *Respondents* (*Respts.*).

Gopalakrishnaswami Naicker v. Srinivasa Aiyangar.

Guardians and Wards Act (VIII of 1890), S 35—Assignment of bond —Application for, by ward attaining majority—Maintainability—Engagement of bond being kept up—Inquiry for deciding as to—Nature of—Regular suit, if necessary—Grounds for being satisfied that engagement of bond has not been kept up.

There is nothing in S. 35 of the Guardians and Wards Act making it inapplicable to the case of a ward attaining majority and applying for an assignment of the security bond executed by the guardian and sureties under S. 34 (*a*) of the Act.

To be satisfied that the engagement of the bond has not been kept up within the meaning of S. 35 of the Act, the court must make some kind of *prima facie* enquiry and should not refer the ward to a regular suit for the purpose of satisfying the court that the engagement has not been kept up if, on a perusal of the accounts, the court has reason to think that at least in respect of some monies received in respect of the property of the ward they have not been duly accounted for, it is reasonable to hold that there is ground for being satisfied that the engagement has not been kept up

Petition under S. 115 of Act V of 1908 and S. 48 of the Guardians and Wards Act, praying the High Court to revise the

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* C.R.P. No. 366 of 1927. 19th December, 1927.

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order of the District Court of Ramnad at Madura, dated 27th January, 1927, in I. A. No. 242 of 1926 in O. P. No. 437 of 1912.

S. Varadachariar and *K. S. Champakesa Aiyangar* for petitioner.

K. Rajah Aiyar P. N. Appuswami Aiyar and *V. Ramaswami Aiyar* for respondents.

The Judgment of the Court was delivered by

Ramesam J.

Ramesam, J. :—This is a revision petition against the order of the District Judge of Ramnad on an application under the Guardians and Wards Act for the assignment of a security bond executed by a guardian and sureties under S. 34 (a) of the Act. That section shows that the guardian and sureties engage themselves duly to account for what may be received in respect of the property of the ward. The learned District Judge rejected the petition holding that as the ward had attained majority he had no jurisdiction to act under S. 35 and for this position he relies upon the decision in *Subbarami Reddi* v. *Pattabhirama Reddi* (1) now also reported in (1926) I L R 50 M. 80. In that case the guardian was discharged after filing his accounts in court and it was held that the Court had no jurisdiction to hold an enquiry and ascertain what amount is really due by the guardian. The application was filed under S. 41 and in the course of the judgment it is observed that a court acting under S. 41 (4) was not bound to make the declaration mentioned in S. 41 (4). This is true. But there is the further observation:

"The whole scheme of the Act seems to provide for matters of this kind, *i e*, disputes between the minor and the guardian, by way of suit During the minority Ss. 35 and 36 provide for suits being filed by a next friend of the minor in case of misconduct on the part of the guardian, and there can be no doubt that, when the minor attains majority, he can bring a suit against his guardian. There being no provision at all for any enquiry into accounts by the court, I think the opinion expressed by the Calcutta High Court is the correct one"

We are not able to agree with everything that seems to be implied in these sentences. Now, taking Ss. 35 and 36 for consideration, we first observe that S. 35 deals with a case where an administration bond was taken and S. 36 where such a bond was not taken. In the case of S. 36 we have got these words:

". . . Any person, with the leave of the court may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian . . . ".

1. (1926) 51 M L J 249 : I L R 50 M 80.

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Ramesam, J.

It is clear that this section relates only to cases where the ward continued to be a ward. But when we come to S. 35 we have not got words like "next friend and during the continuance of the minority of the ward". On the other hand, the language in S. 35 except the very last clause is perfectly general and can apply to a case where the ward was a minor or to a case where the ward has ceased to be a minor. The section was intended to cover both the cases and the last clause " shall be entitled to recover thereon as trustee for the ward in respect of any breach thereof" no doubt applies only to a case where the bond was assigned to some person during the minority of the ward and may not strictly refer to a case where the bond was assigned to the ward after he attained majority. Even then it is not that it produces any anomalous result but it only looks like a surplusage. There is nothing in S. 35 making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond. The court below also relied on the judgment in *Krishna Chettiar* v. *Venkatachalapathi Chettiar* (2). In that case all that was decided was that there is no right of suit as for breach of a condition unless there is a preliminary order of the court. If the matter rested there that case would have given no difficulty, but there are some further observations that the preliminary order should be an order to exhibit accounts or to pay the specified balance and at page 309 we have got the following observation:

"In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against the guardian under S. 34 (*d*) or a decree against him, and, if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence".

This observation is strictly *obiter dictum* and perhaps was not necessary for the decision of the case. Anyhow we are not able to agree with this observation. It has been decided in *Hari Krishna Chettiar* v. *Govindarajulu Naicker* (3) that there can be no order to pay under S. 34 (*d*) except in respect of the amounts that appear due according to the accounts filed by the guardian. So there is some inconsistency between the recent decision and these observations in *Krishna Chettiar* v. *Venkatachalapathi Chettiar* (2). In the present case the District Judge says:

"An assignment of the bond can be made only on being satisfied that the engagement of the bond has not been kept up".

2. (1918) I L R 42 M 302 : 36 M L J 114.
3. (1925) 50 M L J 273.

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Ramesam, J.

This is true; but to be satisfied that the engagement of the bond has not been kept up, the court has to make some kind of *prima facie* enquiry and the ward should not be referred to a regular suit for the purpose of satisfying the court that the engagement has not been kept up. All that S. 35 says is :

"On being satisfied that the engagement of the bond has not been kept up".

If on a perusal of the accounts a court has reason to think that at least in respect of some monies received in respect of the property of the ward they have not been duly accounted for, it is reasonable to hold that there is ground for being satisfied that the engagement has not been kept up. We are therefore unable to agree with the reasoning of the District Judge on this part of the case also.

The result is we set aside the order of the District Judge and direct him to dispose of the case according to law in the light of the above observations. The petitioner will be entitled to costs in this Court and costs in the Court below will abide the result.

A. S. V. *Order set aside and application remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE DEVADOSS.

Adusumilli Gopalakrishnayya ... *Appellant** (*Petitioner*)

v.

Peyyeti Gopalam and others ... *Respondents* (*Counter-Petitioners*).

Gopalakrishnayya v. Gopalam.

Hindu Law—Joint family—Adjudication of father as insolvent—Attachment of sons' shares by creditor—Power of Official Receiver to sell sons' shares, if can be exercised—Right of attaching creditor to proceed with execution.

On the adjudication of the father in a joint Hindu family as an insolvent, the power of the father to sell the shares of the sons passes to the Official Receiver. But this power is subject to the same qualification as it is in the father's hands and, therefore, if the sons' shares have been attached by a creditor, the Official Receiver cannot exercise the power of sale after the attachment, but the attaching creditor is entitled to proceed with the execution by selling the sons' shares.

Appeal against the Order, dated 17th September, 1923, of the Court of the Subordinate Judge of Masulipatam in E. P. No. 481 of 1921 in O. S. No. 10 of 1919.

P. Satyanarayana Rao for appellant.

T. Ramachandra Rao for respondent.

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*A. A. O. No. 14 of 1924. 5th January, 1928.

Gopalakrishnayya v. Gopalam.

The Court delivered the following

JUDGMENT :—Only the power of the father to sell the shares of the sons passes to the Official Receiver [*Sat Narain* v. *Behari Lal* (1)]. But the power is subject to the same qualification as it is in the father's hands, *Allahabad Bank, Ltd., Bareilly* v. *Bhagwan Das Johari* (2) and *Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore* (3). In this case the sons' shares have been attached and, after such attachment, the Official Receiver cannot exercise the power of sale. It is true that, in respect of such properties which were sold by the Official Receiver prior to the attachment of the sons' shares by the decree-holder, the above observations do not apply. Except as to such properties, the appellant is entitled to proceed with the execution by selling the sons' shares. He will now be allowed to execute the decree by selling the sons' shares.

The appeal is allowed with costs in this Court. The costs in the court below will be provided for by the lower court when ordering execution.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE DEVADOSS.

V. Achuthan Nair and another ... *Appellants** (*Defendants*)

v.

Manavikraman *alias* Kunhettan Raja and another ... *Respondents* (*Plaintiffs*).

Achuthan Nair v. Manavikraman.

Civil Procedure Code (1908), *O.* 22, *R.* 4—*Death of defendant or respondent—Legal representatives already on record—Application to bring on legal representatives, if necessary.*

Where the legal representatives for a deceased defendant or respondent are already on record, it is not necessary to file an application within three months to bring on the legal representatives. It is enough if the plaintiff or appellant at some time or other before the hearing of the suit or appeal states the fact and gets it noted on the record.

Appeal against the order of the Court of the Subordinate Judge of Calicut, dated 25th April, 1927, in A. S. No. 143 of 1927 (A. S. No. 290 of 1926 of the District Court, O. S.

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*A. A. O. No. 345 of 1927. 5th January, 1928.

1. (1924) L R 52 I A 22 : I L R 6 Lah. 1 : 47 M L J 857 (P C).
2. (1925) I L R 48 A 343.
3. (1926) I L R 49 M 849 : 51 M L J 269 (F B).

Achuthan Nair v. Manavikraman

No. 496 of 1923 on the file of the Court of the Additional District Munsif of Calicut).

P. R. Ramakrishna Aiyar and *P. R. Vasudeva Aiyar* for appellants.

P. S. Narayanaswami Aiyar and *P. K. Sri Manavikraman Raja* for respondents.

The Court delivered the following

JUDGMENT :—We do not think that, when the legal representatives for a deceased defendant or respondent are on record, an application to bring on the legal representatives within three months is necessary. It is enough if the plaintiff or appellant at some time or other before the hearing of the suit or appeal states the fact and gets it noted on the record. The decision in *Shankar Bai* v. *Motilal* (1) on this matter is not necessary for the case. Anyhow we do not agree with it. The decision in *Gurditta Mal* v. *Muhammad Khan* (2) has been dissented from by the Lahore High Court itself in *Gopal Das* v. *Mul Chand* (3). See also *Maung Po* v. *Ma Shwe Ma* (4) and the decision of Jackson, J., in C. R. P. No. 527 of 1927 with which we agree.

The result is there was no abatement of the suit even as regards 1st defendant. When the District Munsif stated in his order, dated 8th August, 1925, that the abatement as regards the 1st defendant will stand but the suit will proceed against the rest, it was an ambiguous order. One is apt to construe it as an order that there is no abatement against defendants 2 to 25 which is the necessary legal result if they are the legal representatives of the 1st defendant and if the suit abated against 1st defendant. The District Munsif made this clear when he passed the order of the 23rd October and this has been appealed against. There is then no substance in the argument that the order of the 8th August ought to have been appealed against and has become final.

We think the Subordinate Judge is right and dismiss the appeal with costs.

N. S. *Appeal dismissed.*

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1. (1924) I L R 49 B 118.
2. (1925) 7 Lah. L J 544.
3. (1926) I L R 7 Lah 399.
4. (1924) I L R 2 R 445.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Dewan Bahadur G. Narayanaswami Chetty ... *Plaintiff**

v.

C. Ramaswami Chetty and another ... *Defendants.*

Narayanaswami Chetty v. Ramaswami Chetty.

Executor—Sale or mortgage of testator's estate by—Capacity in regard to—Presumption—Circumstances rebutting—Capacity not appearing on face of document, not one of.

Where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary. The contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity.

V. Radhakrishniah, Subramaniam and *Rajagopal* for plaintiff.

K. B. Ranganatha Aiyar and *O. P. Venkataraghavachariar* for defendants.

The Court delivered the following

JUDGMENT:—The plaintiff files this suit to enforce an equitable mortgage created in his favour by the 1st defendant. The suit is brought against the two defendants, who are brothers-in-law, in their capacity as executors with probate of the will of Andalammal who died in January 1913. The 1st defendant borrowed from the plaintiff four sums of money, namely, Rs. 400, Rs. 1,200, Rs. 1,800 and Rs. 500 on the 26th of August, the 18th of October, the 5th of December, 1917, and the 9th of March, 1918, respectively. In respect of each of these sums, the 1st defendant executed a promissory note without describing himself as the executor of Andalammal. The plaintiff's case is that the 1st defendant represented to him that monies were required for the estate of the testatrix and deposited the title deeds of the suit house which belonged to her, intending to create an equitable mortgage.

The pleas raised are these, firstly, that no mortgage was created, but the plaintiff, having obtained the title deeds in another connection has fraudulently put forward this claim; secondly, that the monies were advanced to the 1st defendant personally and not in his capacity as executor, and thirdly, that the mortgage, having been made by only one of the two executors, is

*C. S. No. 853 of 1925. 7th February, 1928.

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not binding upon the estate. I shall deal with these pleas in the order I have mentioned. It is impossible to take any serious notice of the first plea. The plaintiff keeps regular books of accounts and his day books for the years 1917 and 1918 have been filed. Not the slightest suspicion attaches to them and each of the four entries relating to the loans specifically mentions that the advance was made on the security of the property. In the first instance, only the day books were produced, but in cross-examination of the plaintiff, it was elicited that he maintained also rough chittah books. I thereupon directed him to have them produced and they were brought to Court after the luncheon interval. They confirmed and corroborated in every particular the entries in the regular day books and I must say that it is difficult to conceive of a more reckless plea than the books were fabricated for the purposes of this case.

Is there any substance in the second plea, that the 1st defendant entered into these transactions in his individual capacity? The plaintiff states on oath that this man represented to him that legacies had to be paid and repairs to the house had to be executed. The 1st defendant made a further representation at that time that the other executor was dead. The plaintiff then made enquiries of Mr. Vinayaka Mudaliar, a retired Assistant Commissioner of Police, with whom the 1st defendant was associated in the management of a certain temple at Mylapore and the plaintiff was satisfied that the 1st defendant required monies and advanced the same to him. In the first place, among the documents deposited with the plaintiff, is the probate of the will. It is absurd to ask me to believe that the plaintiff, into whose hands was put this probate, could for a moment regard the 1st defendant as the owner of the property. Then, it is an important circumstance that, under the will, the disbursements to be made, including the sums to be paid as legacies, amounted to Rs. 3,800, whereas, the main item of property left by Andalammal was the suit house valued at Rs. 3,000. It is thus obvious that the provisions of the will could not be carried out, without the executors either selling the house or raising money upon its security. The plaintiff deposes that when the first sum of Rs. 400 and the last sum of Rs. 500 were advanced, it was represented to him that the amounts were required for repairing and improving the house. When the other two sums were lent, he was told that they were required for paying off the legacies mentioned in the will. It is admitted that the house was in need of repairs and, as a matter of fact, it is now said that repairs were executed, but it was

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the 2nd defendant who advanced the monies for the purpose. On the face of the will, there could be also no question that monies were really needed for payment of the legacies specified in it. I find no reason for disbelieving the plaintiff's evidence and I accept it as true. I am satisfied that he advanced monies to the 1st defendant on the representation made to him that they were required for the purposes of the estate. I am also satisfied that the 1st defendant borrowed these monies and mortgaged the property in his capacity as executor.

The 2nd defendant pretends that the legacies mentioned in the will were paid by himself out of his own funds within a year of Andalammal's death. I have not the slightest doubt that this evidence is utterly untrue. I do not believe that he spent a single pie of his money in connection with this estate. The defendants say that they were keeping accounts for their management of the estate from Andalammal's death till 1919, but that those account books have been lost. This is a palpable falsehood. The 1st defendant has in his evidence made a reckless statement that he handed these account books to the plaintiff who is said to be suppressing them. In his affidavit of documents, the 1st defendant had previously stated that the books had been lost and he has no explanation to offer in regard to this glaring contradiction. He has deposed further that he mentioned to the 2nd defendant the fact of his having handed over the books to the plaintiff. The 2nd defendant, notwithstanding his anxiety to support his brother-in-law, has not ventured to confirm the story, as in his own affidavit of documents, he also previously stated that the account books had been lost. The net result is that the account books of Annapurani's estate have been wilfully withheld by the defendants, and one cannot help making the inference that if produced they would completely destroy the defendants' case. There is a further circumstance which shows that the case set up is utterly false. The 2nd defendant says that he was carrying on a business in yarn and that he found monies for paying legacies from the profits made in that business. He asks me to believe that he did not keep any accounts in respect of that business. Yesterday, while he was in the box, he said that he made notes in diaries showing that he made the payments. Not only were they not produced yesterday, but even to-day they are not forthcoming. Thus, we find that neither set of accounts is produced, the 2nd defendant's private accounts to show that he paid the monies, nor the estate accounts to show that the monies were received. Then, again, why should the 2nd defendant have paid the

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monies at all at that time? I pass over various contradictions, for, the final statement made is that the legacies were made before the probate was granted. The 2nd defendant was certainly not in such a position as to make a voluntary advance of his own money under no compulsion. There was no obligation on his part to pay his private monies before the house was sold and it is impossible to believe that he was so generous as to voluntarily disburse monies from his own pocket. He now produces an account book, which, on his own showing, is worthless and stands thoroughly discredited. If any legacies were paid, I am sure that, in any event, it was not the 2nd defendant's money that was used in paying them.

I shall now deal with the third plea which raises a question of law. *Under S. 307 of the Indian Succession Act,* an executor has power to dispose of the property of the deceased in such manner as he thinks fit, this power being subject only to any restriction imposed by the will itself. Far from there being such a restriction in this will, the power to sell is implied, it being impossible to pay off the legacies without selling the house. As a matter of fact, it is conceded for the defence that this power is implied. It follows that if the executors could sell the house, they could exercise the lesser power of mortgaging it. Then we come to S. 311 *of the Indian Succession Act.* It says that where there are several executors, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will. Again, not only is there an absence of direction to the contrary, but there is a clause which says that any one of the two executors may perform all the functions of both. There is no substance therefore in the plea put forward.

Moreover, as a question of fact, it is not disputed that the 1st defendant was managing the estate till 1919. There are two rental agreements of the years 1917 and 1918, which show that the 1st defendant alone was managing the estate. In the register of the Corporation of Madras, the name of the owner of the house was very early changed from that of Andalammal to that of the 1st defendant. There was therefore nothing to prevent him from mortgaging a property belonging to the estate.

The law on the point is thus stated by Sterling, J., in *In re Venn & Furze's Contract* (1).

"It appears to me that I have the high authority of Lord Cairns and Lord Cranworth for saying that where a person who fills the position of an

1. (1894) L R 2 Ch. 101.

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executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity."

This case shows that when an executor deals with a property of the estate, it must be presumed that he was acting in that capacity, notwithstanding that this fact does not appear on the face of the document. In *Colyer* v. *Finch* (2), Lord Cranworth observed thus :

"It does not matter that the mortgage to Mr. Finch was not made avowedly—that is, on the face of it—for the purpose of raising money to pay debts; that is not at all necessary, nor could he be affected, unless it was apparent on the face of it that it was not, and could not have been, so, intended. I very much incline to think that when a party, the devisee of real estate, charged with the payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or even whether it is a sale for the purpose of enabling debts to be paid."

These observations apply to the facts of the present case, although I have given a finding that the mortgage was made expressly for the purpose of raising money for the benefit of the estate.

I may mention why and in what circumstances this defence has been raised. It was an ill-advised act of the plaintiff that suggested this false defence. Previous to the suit transaction, the 1st defendant in his personal capacity had borrowed from the plaintiff Rs. 3,000 on the mortgage of his own house, No. 39, Arundale Street. That house, the plaintiff believed, was worth more than the amount due to him. In this belief he filed a suit on the promissory notes mentioned above, against the 1st defendant personally without making any mention of the equitable mortgage in question, and, having obtained a personal decree, he went on to attach the 1st defendant's equity of redemption in 39 Arundale Street. Next he filed a suit on the mortgage of that property. In the course of that litigation the plaintiff mentioned the reason for adopting this strange course. He said that he was advised by some solicitor that the suit mortgage was invalid as it was created only by one of the two executors and that his remedy was to proceed against the 1st defendant personally, as, on the face of the promissory notes, he made himself personally liable. Having found that he was unable to realise his monies by the course he adopted (39, Arundale Street, did not fetch the

2. (1856) L.R 5 H L C 905.

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amount expected), the plaintiff has now filed the present suit under the power given to him under Order 34, Rule 14, Code of Civil Procedure. This circumstance has led the defendants to put forward the plea that the mortgage was never created.

I pass a mortgage decree for Rs. 7,255-8-5, with interest on Rs. 3,900 at 12 per cent. per annum from the date of the plaint to the date fixed for sale and with further interest on the aggregate amount at 6 per cent. thereafter. Time for redemption is one month. The defendants shall pay personally the costs of the suit.

On behalf of the 2nd defendant, I was asked to adjourn the case on the ground that some of his witnesses had not come. This is a most frivolous application. The *ex parte* decree against the 2nd defendant was set aside by consent of the plaintiff and one of the conditions, on which the order was made in his favour, was, that the case was to be peremptorily taken up yesterday. It was done and the hearing was prolonged till to-day, and I have not the slightest doubt that the adjournment is asked for to gain time. No subpœnas have been taken out for these witnesses and it is impossible to accede to this request.

In the course of the trial, the 1st defendant impressed me as such a liar that I intended at the time to take proceedings against him under the Criminal Procedure Code at least in regard to one palpably false statement; but, on reflection, I have decided not to take any such action.

A. S. V. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

Pattathil Sankunni Mannadiar ... *Appellant** (*Deft.*)

v.

Pattathil Krishna Mannadiar ... *Respondent* (*Plaintiff*).

Sankunni Mannadiar v. Krishna Mannadiar.

Malabar Law—Tarwad—Karnavan—Decree removing, and appointing the senior anandravan and a junior member to be co-managers of the tarwad—Member next senior in age to the senior anandravan party to suit but nothing stated about him either in pleadings or in decree—His right to karnavanship on death of senior anandravan—Right of junior member appointed co-manager by decree.

The junior members of a Marumakkathayam tarwad instituted a suit for the removal of the then karnavan and the then senior anandravan of the

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*S. A. Nos. 1780 and 1781 of 1925. 25th August, 1927.

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tarwad on the ground of their unfitness to manage the tarwad affairs. The plaint further prayed for the appointment as manager of the 1st plaintiff in that suit, who would be entitled to the management on the removal of the then karnavan and the then senior anandravan, either solely or in conjunction with K, the 3rd plaintiff in that suit. The 2nd plaintiff in that suit, S, was senior to K, but nothing was alleged in that suit about him. The then senior anandravan died during the pendency of the suit. That suit resulted in a decree by which the then karnavan was removed from the management of the tarwad, and the 1st plaintiff and K, the 3rd plaintiff, therein were appointed to the management.

Held, that that decree could not, on its true construction, be taken to have adjudicated by necessary implication against S's right to be *de jure* karnavan of the tarwad on the death of the 1st plaintiff in that suit; that S could not be deemed to have renounced his rights of karnavanship by reason of the fact that he had allowed his junior, K, to be a co-manager with the 1st plaintiff; and that, on the death of the 1st plaintiff, S, as the next senior in age, became entitled to the karnavanship.

Under the Marumakkathayam Law, the moment the karnavan is removed, the next senior in age becomes the *de jure* manager and karnavan and steps into the position *ipso facto* without any sort of appointment by the court. The 1st plaintiff owed his title to the karnavanship not to his appointment by the decree in question but to the circumstance that the then karnavan had been removed by that decree and that he, the 1st plaintiff, was the next senior in age. The only effect of that decree was to restrict, in the interests of the tarwad, the 1st plaintiff's powers of management by associating K with him in management. It had not the effect of prejudicing the rights of S. much less of depriving him once for all of his rights to be karnavan when his turn should come. Further the restriction imposed by the decree on the 1st plaintiff's powers of management by associating K with him in management ceased to have operation on the death of the 1st plaintiff.

Second Appeals against the decrees of the Court of the Additional Subordinate Judge of Calicut in A. S. No. 5 of 1925 and A. S. No. 6 of 1925 (A. S. No. 368 of 1924 and A. S. No. 369 of 1924 on the file of the District Court of North Malabar) respectively, preferred against the decrees of the Court of the Additional District Munsif of Palghat in O. S. No. 283 of 1923 and O. S. No. 284 of 1923, respectively.

T. R. Ramachandra Aiyar and *A. Sivarama Menon* for appellant.

K. P. M. Menon, P. Govinda Menon and *Eachara Menon* for respondent.

The judgment of the Court was delivered by

Ananthakrishna Aiyar, J.

Ananthakrishna Aiyar, J. :—The question that arises for decision in these cases is which of the two, plaintiff or the defendant, is entitled to the management of the Tarwad known as Kothukkotte in Kannadi Amsom and Desom, and as Pattathil in Mathoor Amsom and Desom of the Palghat Taluk. The court of first instance decided the question in favour of the

Sankunni Mannadiar
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—
Anantha-krishna Aiyar, J.

defendant, whereas the lower appellate court has decided the point in favour of the plaintiff. The defendant accordingly has preferred these second appeals. To appreciate properly the point in dispute, it is necessary to mention that in 1904 the Karnavan of the Tarwad was Parakunni Mannadiar and the next senior Anandravan was Gopala Mannadiar. Original Suit No. 11 of 1904 was instituted by 18 junior members of the Tarwad against Parakunni Mannadiar as the 1st defendant and Gopala Mannadiar as the 2nd defendant for the removal of Karnavan Parakunni Mannadiar, and also for the removal of the senior Anandravan Gopala Mannadiar on the ground that both of them were unfit to manage the Tarwad affairs. The plaint proceeded to state that the 1st plaintiff therein (Ravunni Mannadiar) would be the person who would be entitled to management if the defendants 1 and 2 were removed by the court, and there was a prayer that the 1st plaintiff Revunni Mannadiar should be appointed as manager. The plaint proceeded further to state that if for any reason the court should feel inclined to associate any other member of the tarwad with the 1st plaintiff in management, then the 1st plaintiff Ravunni Mannadiar should be appointed manager *in conjunction with the third plaintiff*. It must be mentioned that there was a second plaintiff in that case Sankunni Mannadiar who was senior to the third plaintiff Krishna Mannadiar but nothing was alleged in the proceedings in Suit No. 11 of 1994 about the 2nd plaintiff Sankunni Mannadiar. Issues were then framed about the removal of the 1st defendant and also about the removal of the second defendant in that suit. The seventh issue then framed ran as follows:—

"Whether the plaintiffs 1 and 3 are unfit to be appointed managers?"

The result of that litigation was that the first defendant Parakunni Mannadiar was removed from management, and the second defendant Gopala Mannadiar having died during the pendency of the suit, no question arose about his removal. Having found that there was no reason for not granting the prayer in the plaint regarding the management of the tarwad affairs by the first plaintiff in conjunction with the 3rd plaintiff, the court passed a decree to the following effect :

"(1) That the 1st defendant be removed from management of the tarwad of the plaintiff and defendants. (2) That the 1st and 3rd plaintiffs be appointed to the management."

Now the 1st and 3rd plaintiffs in that suit continued to manage the properties of the tarwad till the 30th October, 1923, when the 1st plaintiff in the prior suit Ravunni Manna-

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diar died. The 3rd plaintiff in that suit Krishna Mannadiar has instituted O. S. Nos. 283 and 284 of 1923, out of which the present second appeals have arisen for a declaration that he is, in the circumstances that now exist, entitled to manage the affairs of the tarwad and for collection of rent due by the defendant to the tarwad. The defendant to the present suit Sankunni Mannadiar (who was the 2nd plaintiff in Suit No. 11 of 1904) contends that as the admitted seniormost male member of the tarwad at present (excluding of course Parakunni Mannadiar, the karnavan who was removed by virtue of the decree in the prior suit), he is in law entitled as the present *de jure* karnavan to manage the tarwad affairs. The main contention of the plaintiff in the present suits, Krishna Mannadiar, is that under the terms of the decree in Suit No. 11 of 1904 he and Ravunni Mannadiar were appointed co-managers and that on the death of Ravunni Mannadiar he is entitled to the sole management. He further contends that Sankunni Mannadiar should be taken to have been removed from management since his claims were not recognised and since his junior, the present plaintiff, was appointed as manager. As already remarked, the court of first instance upheld the defendant's contention, while the learned Subordinate Judge has upheld the contention of the plaintiff.

Now before considering the effect of the decree in Suit No. 11 of 1904, it is better to state that the right to the management of the tarwad affairs in the case of a Marumakkathayam tarwad devolves on the seniormost male member according to Marumakkathayam Law. When a karnavan is removed, it is now admitted and there are decisions expressly supporting the position that there is no necessity for the court to appoint the next in point of age as manager. When a karnavan is removed the next senior in age becomes the *de jure* manager and karnavan and steps into the position *ipso facto* without any sort of appointment by the Court. [*Nemamma Kudre* v. *Achnu Hengsu* (1) per Krishnan, J. and *Chindan Nambiar* v. *Kunhi Raman Nambiar* (2).] No doubt in some decrees passed by courts one finds occasionally statements to the effect that the previous karnavan is removed and the next senior is appointed as karnavan and manager. But as already remarked it is unnecessary to appoint the next senior to enable him to exercise the rights of the karnavan which he is under Marumakkathayam Law entitled

1. (1919) I L R 43 M 319 at 323.
2. (1918) I L R 41 M 577 at 581 ; 34 M L J 400 (F B).

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to exercise the moment the previous karnavan is removed. Attention has been drawn to this point because a major portion of the arguments of the learned Counsel who appeared for the plaintiff-respondent in these cases were directed towards laying emphasis on the fact that the decree in Suit No. 11 of 1904 states that plaintiffs 1 and 3 in that suit were appointed to the management. If no appointment really be necessary in law to enable the next in seniority to become the manager, the question arises as to what exactly is the construction to be placed on the terms of the decree that was passed in Suit No. 11 of 1904 It has been held that it is legitimate to refer to the pleadings in a case in order to construe the decree that has been passed in the suit, more especially when the wordings of the decree are not very clear. Now referring to the plaint in Suit No. 11 of 1904 it is stated there

"After the removal of defendants 1 and 2 plaintiffs are willing to have the 1st plaintiff alone appointed as manager of the tarwad or the 1st plaintiff in conjunction with the 3rd plaintiff therein."

Absolutely nothing was stated against the 2nd plaintiff in that suit who is the defendant in the present suit. When we examine the proceedings in the prior suits, we think it is clear that the question before the court then were (1) consideration of the removal of defendants 1 and 2 in that suit, and (2) consideration of the question whether the 1st plaintiff Ravunni Mannadiar should be allowed to manage the affairs solely as he would be entitled to it under the Malabar Law, unless the court thought it proper to impose any restrictions on his power of management, or whether any other person should be associated with the first plaintiff in the tarwad management. The defendants having been removed (the 1st defendant by court, the 2nd defendant by his death during the course of the suit) the question that was subsequently decided by court was that the interest of the tarwad required that the *de jure* karnavan, the first plaintiff Ravunni Mannadiar, should be restricted in his powers of management by having the 3rd plaintiff associated in his powers with him in management. Absolutely no question of removing the first plaintiff having arisen in that suit, there could not be any question of removing the 2nd plaintiff therein. The question of associating another member with the 1st plaintiff in his management was only with a view to restrict 1st plaintiff's rights, not to prejudice the next member's rights much less to deprive once for all the next junior of his rights as karnavan when his turn should come. It is therefore impossible to uphold the contention of the learned Counsel for the respondent to the question of the 2nd plaintiff's right to

be the karnavan was decided against him in that suit by necessary implication. Karnavanship is a very valued right among members of a Marumakkathayam Tarwad, and as already remarked the seniormost male member is entitled to be the *de jure* karnavan with rights of management. The only means by which such rights of karnavanship could be lost to the seniormost members are (1) by removal by decree of court, (2) renunciation by act of party and (3) by death. The learned counsel for the respondent at one stage of his argument contended that in this case it must be taken that the second defendant renounced his rights of karnavanship since he allowed his junior to be comanager with the 1st plaintiff; at another stage he urged that on a proper construction of the decree in Suit No. 11 of 1904 it must be taken that the court has adjudicated by necessary implication against his rights of karnavanship. We are unable to accept either of these contentions. In the absence of specific allegations against the 2nd plaintiff and in the absence of any issue relating to him, it is rather difficult to hold that the court adjudicated upon his rights in any way. On the other hand, the natural thing that is likely to have happened and which we find to be what really happened in Suit No. 11 of 1904 was that the 1st plaintiff, who was to be the *de jure* karnavan after the 1st and 2nd defendants were removed, instead of insisting on his rights to be the *sole* manager *agreed* to have his rights of management curtailed to some extent by associating the 3rd plaintiff with him in management. The effect of this was that the 1st plaintiff's rights as karnavan were restricted, not that the next karnavan's rights were in any way affected much less adjudicated against. On the death of the 1st plaintiff, these restrictions *ipso facto* ceased to have any operation, and the next karnavan is in no way affected by them. This is the view that has been taken by the District Munsif in these cases, and we are of opinion that he is right. The learned Subordinate Judge at one portion of his judgment states that the decree should be construed according to its literal terms. If he means to lay down that one is not entitled to look into the pleadings to find out what was really meant by the decree we should point out that he was wrong. It was not disputed before us that a decree, especially if it is ambiguous, should be construed in the light of the judgment that led to it. It is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of *karars* to have the rights of the existing karnavan restricted in certain particulars either by compelling him to associate some other junior with him in the management of the tarwad properties, or by putting other restrictions on his power. It has been uniformly

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held in this court that the effect of such *karars* is only to limit the powers of the particular karnavan concerned, and persons who were only junior members at the time would not be bound by such restrictions when they become in their turn karnavans of the tarwad, unless by themselves being parties to the *karar* they have expressed themselves to be bound by such provisions even when they become karnavans. We need refer only to the two cases that were referred to in the argument, namely, *Cheria Pangi Achan* v. *Unnalachan* (3) and *Narayanan Moosad* v. *Narayanan Moosad* (4). As remarked by Sadasiva Aiyar, J. :

"the whole of the family *karar* in my opinion falls to the ground on the death of the *de jure* karnavan who consented to be bound by it (or by his removal by decree of court) as the next *de jure* karnavan is not bound by the restrictions imposed by the *karar* on his predecessor, except perhaps where he himself has agreed in that *karar* to be bound by those restrictions whenever he succeeded to the karnavasthanam".

See also *Chindan Nambiar* v. *Kunhi Raman Nambiar* (2). The same principle would, we think, apply to the cases where restrictions are imposed by decree of court on a person who was the *de jure* karnavan on the date of the decree. Such restrictions would *prima facie* cease to have operation on the death of the particular karnavan concerned, unless there be something specific in, or necessarily implied by, the decree to the contrary. Further it is a well-recognised principle of law that if the wordings of a decree be ambiguous, such construction should be put on the same as would make the decree in accordance with law and that when a decree is silent on a point, it could be supplemented by the law applicable to the case. *Uttamram* v. *Kishordas* (5), *Amolak Ram* v. *Lachmi Narain* (6), *Maharaja of Bharatpur* v *Rani Kanno Dei* (7). As Sir John Edge, C. J., and Blair, J., say in *Amolak Ram* v. *Lachmi Narain* (6) :

"In construing a decree the terms of which are ambiguous such construction must, if possible, be adopted as will make the decree in accordance with law".

Their Lordships of the Privy Council while overruling the decision of the Allahabad High Court on some other point expressed their approval of the above principle and specifically say as follows :

"Their Lordships agree that all ambiguous documents should be constructed rather to accord with law than to make them conflict with it." [*Maharaja*

2. (1918) I L R 41 M 577 at 581 : 34 M L J 400 (F B).
3. (1916) 32 M L J 323.
4. (1927) M W N 553.
5. (1899) I L R 24 B 149.
6. (1896) I L R 19 A 174 at 179.
7. (1900) L R 28 I A 35 I L R 23 A 181 at 190 (P C).

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cf. *Bharatpur* v. *Ram Kanno Dei* (7).] Parsons, J., in *Uttamram* v. *Kishoredas* (5) states that

"The decree may be supplemented by the law on a point upon which it is silent, but we cannot introduce into it a provision which would be contrary to the law and *ultra vires* on the part of the court pronouncing it".

Further as observed by the Privy Council in *Hari Baksh* v. *Babu Lal* (8).

"To understand and apply a decision of the board or of any court, it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided."

On a proper construction of the terms of the decree in Suit No. 11 of 1904, we are inclined to hold that the 3rd plaintiff in that suit (the present plaintiff before us) was only appointed to associate himself with the then *de jure* karnavan Ravunni Mannadiar the then 1st plaintiff and the 3rd plaintiff's appointment *ipso facto* ceased the moment Ravunni Mannadiar died. We are strengthened in our conclusion by reference to the judgment is Suit No. 11 of 1904, and having regard to the principle applicable to the case and the rights of the members of a Marumakkathyam tarwad we have no hesitation in holding that the person at present entitled to the management of the tarwad in question is Sankunni Mannadiar (the appellant in these second appeals and defendant in these suits) and not Krishna Mannadiar the plaintiff respondent. It therefore follows that the second appeals should be allowed and the District Munsif's decision restored. In the circumstances we direct that all the costs of the parties in both the cases, both here and in the courts below, be paid from the tarwad funds.

A. S. V. *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

P. C.

Musammat Bhagwati v. Banarsi Das.

Musammat Bhagwati *alias* Bhagwan Dei and another ... *Appellants** (*Pltfs.*)

v.

Banarsi Das and others ... *Respondents* (*Defts.*)

Transfer of Property Act (IV of 1882), S. 55, clause 1 (g)—Seller's obligation to discharge all encumbrances existing on property—Contract to

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*P. C. Appeal No. 91 of 1926. 23rd January, 1928.

5. (1899) I L R 24 B 149, at p. 153.
7. (1900) L R 28 I A 35 ; I L R 23 A 181 (P C).
8. (1924) I L R 5 Lah. 92, at p. 102.

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contrary—What amounts to—Sale deed—Construction—Contract Act, S 69 —Vendee—Mortgage on property sold which vendor was bound to discharge—Discharge by vendee of—Recovery of amount paid from vendor—Right of.

Property, which was in fact subject to more mortgages than one, was sold as being subject only to one mortgage in favour of one *P.* The deed of sale expressly stated that, apart from *P's* mortgage, "the property is up to this date free from all rights of transfer by sale, mortgage," *etc.* The last portion of the sale deed provided that "If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrancer, etc., is found in respect of the whole, or, part of the property sold, and as a result of his claim the property pass out of the possession of the vendees," then the vendor should have certain obligations, and that was exclusive of all other rights on the part of the vendee.

Held, on a construction of the sale deed, that there was no contract in it excluding the statutory obligation that the seller is bound to discharge all incumbrances on the property existing at the time of the sale.

The portion of the sale deed, which states what is to ensue in the event of the vendees being put out of possession, may be an additional safeguard, and may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but it does not contradict or restrict the wider language of the contract of sale or narrow or wipe out the obligations under the statute.

Held, further that a payment made by the vendee to satisfy a decree obtained on foot of a mortgage not mentioned in the sale deed was a payment made under compulsion, and that the vendee was, under S. 69 of the Contract Act, entitled to recover the amount paid from the vendor.

Appeal (No. 91 of 1926) from a judgment and decree of the High Court, Allahabad (Mukerji and Dalal, JJ.), dated the 8th April, 1924, reversing a decree of the Court of the Subordinate Judge of Aligarh, dated the 16th June, 1921.

The facts of the case appear sufficiently from the judgment of the High Court reported in *Ram Chander* v. *Bhagwati* (1).

Dube for appellants.

Hyam for respondents.

Their Lordships' judgment was delivered by

Lord Shaw

LORD SHAW :—This is an appeal from a decree of the High Court of Judicature at Allahabad which reversed a judgment and decree of the Subordinate Judge of Aligarh.

The question is a short and simple one. It arises under S. 55 of the Transfer of Property Act, clause 1, sub-section (*g*), and the bearing thereon of the terms of a particular contract of sale.

The parties were vendor and vendee of a certain piece of immovable property. S. 55 is expressed in terms of a very absolute and clear character. It provides, the irrelevant parts of the section being omitted, that in the absence of " a contract

1. (1924) 22 A L J 576.

to the contrary," the buyer and the seller of immovable property are subject to liabilities and have rights, in the enumeration of the elementary proposition that the seller is bound to discharge all incumbrances then existing on the property. It is said, however, that this statutory obligation was negatived in the particular circumstances of this case by reason of the terms of the contract of sale.

The fact is that there had been more than one mortgage existing on the property prior to the transaction of sale. But the language of the deed of sale recognises only one of those mortgages and makes no mention of the others. "The said property" (says the sale deed) "is mortgaged to Parshadi Lal, son of Tika Ram...under a mortgage deed for Rs. 4,000." *Quoad ultra* this deed is an absolute and unreserved disposal by sale of the property, unencumbered and free from all mortgage. The language of the deed of sale is that, apart from the Parshadi Lal mortgage, "the property is up to this date free from all rights of transfer by sale, mortgage," etc. There is an absolute declaration by the vendor to the vendee that he is buying the property free from all mortgages and covenants, except the one that has just been named.

It may reasonably be asked : Up to that point is there any "contract to the contrary" of the terms of the statute ? There is none.

But it is said that "If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc., is found in respect of the whole, or part of the property sold, and as a result of his claim the property pass out of the possession of the vendees," then the vendor shall have certain obligations, and that is exclusive of all other rights on the part of the vendee.

It is sufficient in their Lordships' opinion to point out that no such event ever happened. The property did not pass out of the possession of the vendee. The vendee stuck to his property, but he was forced in a court of law to answer the rights of the mortgage holder, and to meet another mortgage of a very considerable amount. Certain legal proceedings were taken, and a decree of the High Court was granted putting in execution this other mortgage and the vendees, that is to say, the present appellants, were compelled to pay the sum of Rs. 13,204. In their Lordships' opinion that sum was paid under compulsion, and, secondly, it was undoubtedly a payment for which they were, and are, entitled to be recouped from the vendor of the property for a payment so made.

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It is of no use reciting the law to this effect : the law is plain. Under S. 69 of the Contract Act it is clear this was payment of money which another was bound to pay by law and, therefore, the person who paid it is entitled to be re-imbursed by the other party.

With regard to the last portion of the sale deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligations under the statute cannot be maintained.

On those grounds their Lordships see no reason for upholding the judgment under appeal, and they think that the Subordinate Judge was right and his judgment should be restored and that the appellants should be awarded costs from the date of that judgment, including the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents : *Barrow, Rogers* and *Nevill.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Musammat Hussain Bibi ... *Appellant** (*Defendant*)

v.

Sayad Nur Hussain Shah and others ... *Respondents* (*Pltfs.*)

P. C.

Musammat Hussain Bibi v Sayad Nur Hussain Shah.

Trust—Trustee—Removal from office of—Grounds—Assertion of his own title to trust property—Mismanagement of trust—Misappropriation of trust funds—Privy Council—Appeal—New point—Permissibility—Trust—Denial of existence and of public character of—Existence of trust and of its public character admitted in courts below—Religious Endowments Act (*XX of* 1863), *S.* 14.

The law of India insists upon honest administration and management of a *wakf* or religious institution and upon conformity to, and not defiance of, the trusts for which such an institution is established, and a breach of those obligations is a ground for removal from office.

The setting up by a trustee of title to various portions, if not to the whole, of the trust property as his own personal estate may not of itself be a sufficient ground for removal of the trustee from office in a case in which there has been a mistaken impression as to right but no mismanage-

*P. C. Appeal No. 22 of 1926. 21st February, 1928.

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ment of the trust. Such a case would be a unique case requiring very special proof.

Where the trustee had not merely set up his own title to the trust property, but had alienated various portions thereof, asserting in the sale deeds granted by him that the property was his own, and had besides neglected every one of the duties imposed on him as trustee and misappropriated the income of the trust property, *held* that the High Court was justified in having removed him from his office. *Raja Peary Mohan Mukerji* v. *Manohar Mukerji*, (1921) L R 48 I A 258 : I L R 48 C 1019 : 41 M L J 68 (P C), *Srinivasa Chariar* v. *Evlappa Mudaliar*, (1922) L R 49 I A 237 : I L R 45 M 565 : 43 M L J 536 (P C), and *Vaidyanatha Aiyar* v. *Swaminatha Aiyar*, (1924) L R 51 I A 282 : I L R 47 M 884 : 47 M L J 361 (P C), followed.

Where, in a suit for the removal from office of a *gaddi nashin* or trustee of a *wakf*, the trustee conducted his case in the courts below on the footing that a *wakf* existed and that it was a public *wakf*, *held*, that he could not, for the first time in his appeal to the Privy Council, be allowed to raise the defence that there was no *wakf* at all, or, that, if a *wakf* existed at all, it was not public but private.

Appeal (No. 22 of 1926) from a judgment and decree of the High Court, Lahore (Martineau and Moti Sagar, JJ.). dated the 16th April, 1924, reversing a judgment and decree of the District Judge of Lahore, dated the 3rd January, 1923.

The material facts of the case are set out in their Lordships' judgment, and also in the report of the case in the Court below; see *Nur Hussain Shaw* v. *Musammat Hussain Bibi* (1).

Abdul Majid for appellant.

Dube for respondents.

Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from the judgment and decree of the High Court of Judicature at Lahore, dated April 16th, 1924, reversing a judgment and decree of the District Judge, dated January 3rd, 1923.

The appeal arises out of a suit brought by the plaintiffs under S. 14 of the Religious Endowments Act (XX of 1863) in respect of a religious institution at Lahore known as the Takia Rasul Shahian.

Under that section "any person or persons interested in any mosque, temple or religious establishment or in the performance of the worship or of the service thereof or the trust relating thereto may...sue.....the trustee, manager or superintendent... for any misfeasance, breach of trust or neglect of duty.... and the Civil Court may direct" specific performance, damages, etc., "and may also direct the removal of such trustee, manager, superintendent or member of the Committee."

1. (1924) 89 I C 429.

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The case has been fought out in the courts below on the footing that a *wakf* existed, of which the appellant Hussain Bibi was *gaddi nashin* and trustee—with, of course, the responsibilities which attach to such a position. The judgment of the District Judge narrates that Hussain Bibi has been judicially held to be the *de facto* trustee or *gaddi nashin* of this particular institution, and he proceeds to deal with the case upon that footing.

From the High Court judgment it is only necessary to cite this, namely, that "the defendant repudiated the allegations made by the plaintiffs in their plaint [that is, acts of misfeasance, etc.] and contended that she had been duly appointed a *gaddi nashin* and had properly managed the Institution."

In these circumstances, the Board heard with astonishment the first and fundamental proposition of the learned counsel for the appellant to the effect that the question was whether there was a *wakf* at all. The courts below had not heard this audacious proposition and had disposed of the case *in foro contentioso* on the main subject of dispute, *viz.*, whether there had been such maladministration of the *wakf* by the appellant as *gaddi nashin* as warranted her being removed from office.

It seems perfectly plain, not only from the facts in this case, but from the records of previous litigation, that the *wakf* existed and that she was *gaddi nashin* thereof; but it is unnecessary to go into that topic, for it would not be in accordance with the practice of the Board to permit litigation to be so conducted.

"It is not in accordance with justice to the parties that after an appeal has been made to the Privy Council they should for the first time learn what the true nature of the case to be made against them is, nor is such a course fair to the Colonial Courts, whose judgments would thus be attacked upon remarks* which they had not had an opportunity of considering".

[*White* v. *Victoria Lumber & Manufacturing Co., Ltd.* (2)]

The same observation applies to a further proposition attempted by the learned counsel to the effect that, if this was a *wakf*, it was not public, but private. That was not the position maintained in the courts below, and no such distinction of that kind was attempted nor was any bar set up to the ambit of responsibility of the *gaddi nashin* on any such ground.

The facts of this case are of such a quality that the slightest sketch thereof seems sufficient to justify the High Court in

*The word *"remarks"* is apparently a slip for *"grounds"*; see Lord Shaw's judgment in (1910) A. C. 613 line 11—*K. J. R.*

2. L R (1910) A C 606.

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having removed this lady from office. That Court finds that she has been bringing the income of the trust property to her own private use. As to conserving the property, the High Court believes one witness to the effect that the defendant and her father have even removed the tomb of a previous incumbent of the shrine and have been tying a she-buffalo on that place.

As to the building, the shrine and hostel have become dilapidated: the income has been spent for the appellant's own personal uses, and there has been steady misappropriation. It is unnecessary to enter at length into the cases of neglect, etc., in detail. One of the purposes for which the *wakf* was instituted was to make provision for fakirs and dervishes, and to arrange for their residence and comfort in a hostel; to perform certain services at the shrine; and, in short, to look after and maintain the mosque as a structure and as a place of worship with an *imam* to lead the prayers. Every one of these duties has been neglected.

Without further discussing the details of this neglect, their Lordships may now refer to the two principal elements of the case—which appeared to them by themselves to justify the removal of the lady from office. She has been persistently setting up a title to various portions, if not to the whole, of the property as her own personal estate. This of itself might not be sufficient; that is to say, it is possible to figure a case in which the property has been carefully and judiciously managed while the trustee had the impression that the property was his or her own. That would be a case of mistaken impression as to right, but no mismanagement of the subject of the trust, a unique case which would require very special proof. But the present case is entirely different, because the appellant has not merely set up her own title to the property, but she has alienated various portions thereof, asserting in the sale deeds granted by her that the property was her own. These various transactions are narrated in the judgment of the High Court. There seem, therefore, all the elements of disqualification to be present. The case when it has reached this stage is beyond further argument. It falls within the ordinary principles of the insistence by the law of India upon honest administration and management of a *wakf* or religious institution and upon conformity to, and not defiance of, the trusts for which such an institution is established. A breach of those obligations is a ground for removal from office. In recent years this Board has reiterated those principles, and reference may be made to *Raja Peary Mohan*

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Mukerji v. *Monohar Mukerji* (3), *Srinivasa Chariar* v. *Evalappa Mudaliar* (4) and *Vaidyanatha Aiyar* v. *Swaminatha Aiyar* (5).

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors for appellant : *Francis* and *Harker*

Solicitors for respondents: *Chapman, Walker* and *Shephard.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD PHILLIMORE, LORD BLANESBURGH AND MR. AMEER ALI.

Jijibhoy N. Surty ... *Appellant** (*Plaintiff*)

v.

T. S. Chettyar (a firm) ... *Respondents* (*Defendants*).

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Jijibhoy N. Surty v. T. S. Chettyar.

Limitation Act (IX of 1908), Article 151—Time allowed by—Exclusion from, of time taken up in obtaining copies of decree and judgment—Right to—Copies not required by Rules of Court to be annexed to memo. of appeal—Effect—S. 12 of Limitation Act—Applicability to O S. Appeals—Provision for exclusion under section—Strictness in application of—Necessity—"Requisite" in section—Meaning of—Review—Point not taken at original hearing—Raising of, in review—Permissibility—Appellant successful—Costs awarded to—Review petition unnecessary to court below—Payment by appellant of—Order for.

In reckoning the period of 20 days allowed by Article 151 of the Limitation Act, the appellant is, under S. 12 thereof, entitled to an exclusion of the time during which he was procuring a copy of the decree and a copy of the judgment, though by the rules of the court such copies are not required to be annexed to the memorandum of appeal.

S. 12 of the Limitation Act makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.

The High Courts ought to be strict in applying the provision of exclusion. The word "requisite" is a strong word; it may be regarded as meaning something more than the word required. It means "properly required", and it throws upon the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default.

Quaere : Whether a party is entitled, by a proceeding in review, to raise a point not taken by him at the original hearing.

Their Lordships directed the successful appellant, who had not taken the right point at the original hearing of the appeal to the High Court, and who thereby brought about an application for review, to pay the costs of that application by way of deduction from the costs awarded to him.

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*P. C. Appeal No. 56 of 1927. 4th February, 1928.

3. (1921) L R 48 I A 258 : I L R 48 C 1019 : 41 M L J 68 (P C).
4. (1922) L R 49 I A 237 : I L R 45 M 565 : 43 M L J 536 (P C).
5. (1924) L R 51 I A 282 : I L R 47 M 884 : 47 M L J 361 (P C).

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Case-law discussed.

Judgment of the High Court reversed.

Appeal (No. 56 of 1927) by special leave from two decrees made by the High Court of Rangoon on appeal in a suit which the appellant had instituted on the Original Side of that Court against the respondents.

The Trial Judge (Mr. Justice Rutledge) heard the suit on the merits and dismissed it on 8th January, 1925. The Appeal Court (Robinson, C. J., and Brown, J.) by a decree, dated the 8th June, 1925, dismissed the appellant's appeal as not having been preferred within time and by another decree made on review and dated the 22nd February, 1926 (Rutledge, C. J., and Chari, J.), confirmed their previous decree.

The only point in dispute in the appeal before the Privy Council was whether the Appeal Court in India were right in dismissing the appeal as out of time.

The material facts of the case are set out in their Lordships' judgment. See also the report in the Court below, *J. N. Surty* v. *T. S. Chettyar Firm* (1), where the judgments on the appeal and review are printed.

Brown and *Parikh* for appellant.

Lowndes, K. C., and *Jardine* for respondents.

Their Lordships' Judgment was delivered by

Lord Phillimore.

LORD PHILLIMORE.—The appellant is plaintiff in a suit brought on the original side of the High Court of Rangoon which was dismissed on the 8th January, 1925. On the 28th April he presented to the appellate side of the Court a memorandum of appeal against the decree.

The Judge before whom the appeal came for admission noted that the appeal appeared to be out of time and directed that this point should be argued as a preliminary question before a bench of the High Court. Thereupon the appellant filed affidavits explaining the delay, and also a petition praying for an extension of time. The Court decided that he was in delay, and that no sufficient reason had been shown for any indulgence and dismissed the appeal.

Thereupon the appellant applied for a review of the decree dismissing the appeal, and for the first time argued that under the provisions of the Indian Limitation Act, the time during which he was procuring a copy of the decree and a copy of what is called the judgment—that is, the Judge's reasons for the decree—was not to be reckoned as part of the period of 20 days which was prescribed by Art. 151 for such appeals.

1. (1925) I L R 4 R 265.

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To this it was answered by the respondents that this section applied only to cases where the Code of Civil Procedure required that the memorandum of appeal should be accompanied by copies of the judgment and decree, and that by the rules of the High Court of Rangoon, which could modify that Code, where the appeal presented was not from a decree in the mofussil but from the original side of the same Court, the appeal could be presented without annexing the two documents, and that *cessante ratione cessat lex*, and, therefore, the period of 20 days was unqualified.

It may perhaps be questioned whether the appellant, who had not taken this point when the matter first came to be argued, was entitled to raise it by a proceeding in review; but leave was given to him so to apply. The Court then heard his arguments, but decided in favour of the respondents affirming its previous decision that the appeal was out of time. It is from this decision that the present appeal is brought.

S. 12 of the Limitation Act provides (*inter alia*) as follows :

"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

'(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall* be excluded."

Under the Code of Civil Procedure, O. 41, R. 1 makes it necessary that the memorandum of appeal should be accompanied by copies of the decree and judgment, and this is the general rule. S. 122, however, gives power to the High Courts, established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, to annul, alter or add to the rules in the Code, and by the Government of India Act, 1915, this power is extended to other High Courts. Several High and Chief Courts have exercised this power, and in particular this High Court has made rules in the following terms:—

"Memoranda of appeal and applications for revision shall be accompanied by certified copies of the following documents :—

"(1) The decree or order against which an appeal or an application is made,

*The word *"also"* is inadvertently omitted from their Lordships' judgment. Sub-section 3 enacts that "...the time...shall also be excluded".—*K. J. R.*

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"(2) The judgment on which such decree or order is founded unless the court dispenses therewith, and

"(3) In appeals and applications from appellate decrees or orders the judgment of the court of first instance, unless the court dispenses therewith.

"Provided that a memorandum of appeal against a decree or order of the High Court in the exercise of its Original Civil Jurisdiction may be presented without a certified copy of the decree or formal order accompanying it."

It is therefore not necessary on an appeal to the appellate side that the memorandum of appeal should have both documents annexed to it. And if the only reason for excluding the time for procuring these documents was that they were necessary to the presentation of the appeal, it might be said that the provisions of S. 12 could not have been meant to apply to such a case.

Even so, however, there would be a difficulty in dealing with the grammatical construction of the words; but their Lordships, if they had found a consistent course of practice, would have been disposed to accept the construction put upon them by the High Court of Rangoon. When, however, the matter comes to be examined, it is found that there have been divergencies of opinion in the several High Courts, and that the more prevalent opinion is not that which has been taken by the High Court of Rangoon.

In *Haji Hassum Oomer* v. *Nur Mahomed* (2), Sir Lawrence Jenkins, C. J., and Batchelor, J., held that in reckoning the time for presenting an appeal, the time required for obtaining a copy of the judgment must be excluded, even though by the rules of the Court it was not necessary to obtain a copy of the judgment to file with the memorandum of appeal.

In *Kirpa Ram* v. *Rakhi* (3), the Court held that S. 12 of the Limitation Act applied to appeals under S. 70 of the Punjab Courts Act under which the period for appealing was 90 days, and that the time required for obtaining copies of the judgment and decree must be excluded, though by the rules of the Court such copies were not required to be annexed to the memorandum in that particular class of appeal.

In *Kalipada* v. *Shekhar Basini* (4), Sir Lancelot Sanderson, C. J., and Mookerjee, J., held that in a case where the period of 90 days was prescribed for appealing, S. 12 of the Limitation Act excluded the period required for obtaining a

2. (1904) I L R 28 B 643. 3. 534 P R 1907.
4. (1916) 24 C L J 235.

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copy of the decree, even though the rules did not prescribe that a copy of the decree should be attached to the application.

The point also arose, though indirectly, as a matter for consideration, in *Wajid Ali Shah* v. *Nawal Kishore* (5). In that case the argument began from the other end. It was contended for the respondent that it must be the rule that a copy of the decree should be annexed to the memorandum of appeal, because the Limitation Act excluded the time for procuring that copy. But the reply made by Sir John Edge, C. J., presiding over a Full Bench, was that there might be other reasons for giving to the appellant this time. The Chief Justice pointed out that the legislature might intend to give possible appellants time to consider the terms of the decree before hurrying into an appeal from it.

To these authorities it should perhaps be added that in the case of *Pramatha Nath Roy* v. *Lee* (6) it seems to have been assumed that the time properly required for obtaining copies of the two documents was to be excluded, the discussion turning upon the question whether the steps taken by the appellant were sufficiently prompt to entitle him to the benefit of this provision.

It appeared at one time during the course of the argument that an earlier decision of a Full Bench of the High Court of Allahabad when Sir Robert Stewart was Chief Justice [*Fazal Muhammad* v. *Phul Kuar* (7)] was to the contrary effect; but after closer examination it was discovered by their Lordships that the case was not a decision on the Limitation Act, but upon what is known as a letters-patent appeal, that is an appeal under the clause in the charter constituting the Court, which clause fixes its own period for appeal and has no provision like that in the Limitation Act for excluding the period of time required for getting copies of the judgment and decree.

The learned counsel for the respondents who, at first, relied upon this case, upon consideration, saw that this was so, and withdrew the case from his argument. It seems, however, that other tribunals have not been equally fortunate in discovery. The three other decisions on which the respondents relied take their origin from a misapprehension of this case in *Fazal Muhammad* v. *Phul Kuar* (7).

5. (1893) I L R 17 A 213 (F B).
6. (1922) L R 49 I A 307 : I L R 49 C 990 : 43 M L J 765 (P C).
7. (1879) I L R 2 A 192 (F B).

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In *Jadhaoji Raghoji* v. *Rajoo Babaji* (8) the court expressed the opinion that inasmuch as the annexation of the two documents to the memorandum of appeal was not necessary, the exclusion provided by S. 12 of the Limitation Act did not apply. However, in the circumstances the Court held that the delay might be excused, and allowed the appeal to proceed. This may explain why the apparently opposite case in *Haji Hassum Oomer* v. *Nur Mohomed* (2) came to be decided without referring the matter to a Full Bench.

There is, at any rate, this to be said, the earlier case in *Jadhaoji Raghoji* v. *Rajoo Babaji* (8) professes to be founded on the case in *Fasal Muhammad* v. *Phul Kuar* (7) which, as already observed, when closely investigated, affords no such foundation.

Then there are two cases in the High Court of Madras. The earlier one, *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu* (9) (decided in 1897 by Sir Arthur Collins, C. J., and Shephard, J.), in which it was held definitely that the period was not to be deducted, the Chief Justice saying "that the provision can only be held to apply where it is necessary to file with such appeal a copy of the decree or judgment," and Shephard, J., quoting the case in *Fasal Muhammad* v. *Phul Kuar* . (7) as supporting his view.

It so happens, however, that there was another ground upon which it could be held, and was held, that the section of the Limitation Act did not apply, as the proceedings were under an Act which is complete in itself, though this was not the prominent ground put forward by the Court.

Lastly comes the other case [*Abu Backer Sahib* v. *Secretary of State* (10), decided in 1909], the point arising under the same Act, and the case being decided like the previous one, on both grounds, though on this occasion greater prominence was given to the special Act.

Besides these authorities there are, in the arguments in the cases cited, references made from time to time to unreported cases, and their Lordships have also investigated some authorities laid before them which, however, have no real bearing. The result, as has been already stated, is that the preponderance of practice is in favour of the appellant.

2. (1904) I L R 28 B 643. 7. (1879) I L R 2 A 192 (F B).
8. (1899) 1 Bom. L R 112. 9. (1897) I L R 20 M 476.
10. (1909) I L R 34 M 505 : 20 M L J 283 (F B).

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Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation. S. 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.

If, indeed, it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt when the case does not come from up country, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the legislature may not wish him to hurry to make a decision till he has well considered it.

There is force no doubt in the observation made in the High Court that the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioners; and their Lordships would be unwilling to discourage any such effort. All, however, that can be done as the law stands, is for the High Courts to be strict in applying the provision of exclusion.

The word "requisite" is a strong word; it may be regarded as meaning something more than the word required. It means "properly required," and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default.

But for that time which is taken up by his opponent in drawing up the decree, or by the officials of the Court in preparing and issuing the two documents, he is not responsible.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the case remitted to the High Court to be heard upon its merits. The appellant must have the costs of the appeal to His Majesty in Council and the costs of the first hearing when the admissibility of his appeal was discussed in the High Court.

Inasmuch, however, as he did not take the right point on that occasion and thereby brought about the application in review,

he must pay the costs of that application by way of deduction from those awarded to him.

Solicitor for appellant : *J. E. Lambert.*

Solicitors for respondents : *Cutler, Allingham & Ford.*

K. J. R. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Offg. Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

Rajagopala Naidu ... *Appellant* in both appeals (Plaintiff in both)*

v.

Subbammal and another ... *Respondents in Appeal No.* 339 *of* 1923 (*Defendants* 2 *and* 6)

Ramachandran, minor by mother and guardian Krishnammal ... *Respondent in Appeal No.* 459. *of* 1923 (*3rd defendant*).

Rajagopala Naidu v. Subbammal.

Civil Procedure Code, S. 98—Two Judges of the High Court hearing an appeal—Judges agreeing as regards a portion and differing as to the rest—Form of decree to be passed

Two Judges of the High Court who heard an appeal from the muffassil agreed that the lower court's decree must be varied as regards certain items and confirmed as regards certain other items, but differed as to the rest.

Held that the proper decree to be passed under S. 98 of the Civil Procedure Code ought not to be one confirming the lower court's decree as a whole but must be one in part allowing the appeal varying the lower court's decree as regards the items about which the Judges were agreed that it should be allowed and in other respects dismissing the appeal confirming the lower court's decree.

Punjab Akhbarat and Press Co. v. *Ogilvie,* (1925) I L R 7 Lah. 179, dissented from.

Appeal 223 of 1920, followed.

Appeal No. 339 *of* 1923 :—Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in Original Suit No. 62 of 1918.

Appeal No. 459 *of* 1923 :—Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in O. S. No. 38 of 1920.

C. S. Venkatachariar and *V. K. Srinivasa Aiyangar* for appellants.

T. V. Muthukrishna Aiyar, K. Narasimha Aiyangar and *V. C. Veeraragavachariar* for respondents.

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*Appeals Nos 339 and 459 of 1923. 31st October, 1927.

Rajagopala Naidu v. Subbammal.

Sir William Phillips, O. C. J.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice* :—I have had the advantage of having read the judgment about to be pronounced by my learned brother, in which I concur, and will only briefly give my reasons.

In this case we are agreed in respect of the major portion of the suit claim but have differed in respect of one item. It is now contended for the respondents that under S. 98 (2) of the Code of Civil Procedure the decree appealed from must be confirmed. This contention is based on the language of that section which says :

"where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed."

This is a possible interpretation of that section and has been adopted by the Lahore High Court in *Punjab Akhbarat and Press Co.* v. *Ogilvie* (1). A contrary view was taken by myself and Venkattasubba Rao, J., in Appeal No. 223 of 1920 (unreported). To accept the respondent's contention would lead to extraordinary results. I may cite an instance of what might happen. The plaintiff files a suit for 10 lakhs including one claim amounting to 9½ lakhs and another to half a lakh. On the facts his suit is dismissed by the trial court. In appeal two Judges of this court agree in finding that upon the facts the plaintiff is entitled to a decree for 9½ lakhs, but in respect of the remaining half a lakh there is a difference of opinion. If respondent's contention is correct, the plaintiff's suit would have to be dismissed and inasmuch as no substantial question of law is concerned he would have no right of appeal to the Privy Council. He will thus be deprived of a sum of 9½ lakhs to which two Judges of this court had decided that he was entitled. If, therefore, any other interpretation of the section is possible, I think it must be adopted in preference. If we read S. 98 (1), I think that the interpretation in appeal 223 of 1920 is clearly the right one. S. 98 (1) reads :

'Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges."

Unless the word "opinion" is to be interpreted as meaning the opinion of the Judges on the whole case and is not to mean opinion on each of the questions in issue, it cannot be said that there is no opinion of such Judges, when their opinion is in agreement on all questions but one. I see no reason why we should restrict the meaning of the word "opinion" in this manner,

1. (1925) I L R 7 Lah. 179.

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Sir William Phillips, O. C. J.

for, obviously each Judge must form an opinion on each question in issue, and, when the opinions of the two Judges coincide on any question, the decree may be in accordance with that opinion. In respect of the larger portion of the claim before us our opinion is identical and therefore the appeal must be decided accordingly. In respect of the remaining matters we hold different opinions and then the provisions of section 98 (2) become applicable. As there is no majority in respect of the remaining matter the decree must be confirmed. Where there is a concurrent opinion of both the Judges, the decree must be in accordance with that opinion. In this view the decree of the lower court will have to be varied in accordance with our joint opinion and in other respects confirmed.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—After the Officiating Chief Justice and myself delivered our respective judgments in these appeals, Mr. T. V. Muthukrishna Aiyar on behalf of the respondents raised an important point with regard to the decretal order to be passed as the result of our findings. He contended that on a proper construction of S. 98 of the Code of Civil Procedure the proper order to be passed is that both the appeals should be rejected and dismissed and the decision of the lower court confirmed.

The suits from which these appeals have arisen have been for an account as against an agent and for payment to the plaintiff of what may be found due on the taking of such accounts. The view taken by the lower court with respect to various separate items of charges had to be canvassed and though I agree with the learned Officiating Chief Justice in respect of nearly all the matters, I took a different view with regard to a single charge relating to the expenses in connection with a particular litigation.

The argument was that where an appeal is heard by a bench of two Judges unless both of them agree with regard to every point and the final order to be passed either varying or reversing the decree, the decree of the lower court should be confirmed, or in other words, that, though both the Judges should agree to vary the decree in respect of most matters, the mere fact that they are unable to agree with regard, it may be, to a comparatively trivial item, still, effect should not be given to their decision even in respect of matters in which they are agreed.

The first observation that falls to be made with regard to such a contention is that it is thoroughly illogical and altogether unreasonable. But if however it should turn out that such is the result on a proper construction of the statutory provision in S. 98, no doubt it cannot be helped and it must ultimately be left

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to the legislature to amend it so as to make it logical and reasonable. The question therefore is whether the construction contended for is the correct one. The learned vakil for the respondents has referred in support of his argument to the decision of the Full Bench of this court in *Manavikraman Thirumalpad* v. *The Collector of Nilgiris* (2). We have carefully examined the same, and, if we should have come to the conclusion that there was in that case a decision with regard to the matter which can be regarded as binding on us, we should in the view we have taken have felt compelled to refer the matter to the reconsideration of the Court constituted by a larger number of Judges. Though in that case there is an expression of opinion by at any rate two of the learned Judges in favour of the view now contended for, we are unable to regard such opinion as a decision in the case. The Letters Patent Appeal before the learned Judges in that case was dismissed on the ground that no appeal lay, and further with regard to the main matter in controversy there was an agreement arrived at and therefore the *dicta* of the two learned Judges were entirely *obiter*. There is no other reported case in Madras to which our attention had been called.

One other case that was cited by the learned vakil for the respondents and strongly relied upon was *Punjab Akhbarat and Press Co.* v. *Ogilvie* (1). There is no doubt that the construction now contended for regarding S. 98, Civil Procedure Code, found acceptance with the learned Judges in that case. We cannot however regard it as binding on us.

The only other reported case that has been referred to in this connection is *Mohunt Krishen Doyal Gir* v. *Irshad Ali Khan* (3). There is an expression of opinion by Mookerjee, J., in his judgment in that case which is against the contention now put forward on behalf of the respondents. But beyond the mere expression of opinion there is not, even by that learned Judge, any detailed examination or statement of the grounds. It follows therefore that it is necessary for us to subject the terms of the section to a close and critical examination with regard to the argument advanced.

Apart from the *proviso* to S. 98, there are two clauses. The first clause is :

"where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges".

1. (1925) I L R 7 Lah. 179.
2. (1918) I L R 41 M 943 : 35 M L J 110 (F B).
3. (1915) 22 C L J 525 (F B).

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And the second clause is :

"where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed."

The thing that strikes one reading both the clauses side by side is that the expression used in the first clause is "opinion" and in the second clause the expression is "judgment". The provision in the first clause is to the effect that where two or more judges hear an appeal, the appeal should be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges. By *contradistinction* to majority in the latter part of the clause we must take it that the expression "opinion of such Judges" has reference to unanimity of opinion. The word used in the clause is "opinion" and not "judgment", because when the court is constituted by two or more Judges the opinions of the Judges cannot always be the judgment of the court. And the first clause therefore merely directs that the disposal of the appeal, that is to say, the effective judgment of the court, shall be in accordance with the opinion of the Judges or a majority of them whenever there is a majority. If there are only two Judges, there is no question of majority or minority. Therefore it follows that when there are only two Judges hearing the appeal, the disposal of the appeal should be in accordance with the opinion of both the Judges. That clearly means that the judgment of the court in that case shall be in accordance with what both the Judges may concur in and agree to. If both the Judges do not arrive at the same opinion with regard to any one particular matter in appeal, it follows that the opinion of one or the other of them cannot properly be described as "the opinion of such Judges"; and therefore the result would be that the judgment of the court in such cases would not cover or comprehend any matters in which each of the Judges takes a different view, but will cover and comprehend all matters in which there is an agreement of opinion. If there are three or more Judges and the majority of the Judges concur in certain opinions, then the decision should be according to such opinions. If for instance there are four Judges and in respect of some matters three of them agree and in respect of other matters they are divided equally, two holding one view and the other two taking another view, the appeal is directed to be decided according to the opinion of the majority of the Judges in respect of matters with regard to which they concur. That seems to be the reason why the clause speaks of the decision of the appeal and only of the opinion of the Judges.

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The second clause provides for cases where there is no such majority. The expression "majority" in the second clause undoubtedly includes unanimity, and the clause states that where there is no such unanimity, or majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed. The clause does not speak of or refer to the majority concurring in a judgment to confirm the lower court's decision because according to the scheme of the clause, that is the residuary result, if there should be no concurrence with regard to varying or reversing. The expression that is used in the second clause is "judgment" and not "opinion" because the section speaks of varying or reversing a decree and it has therefore to be a judgment of the court and not merely the opinion of the Judges.

Further the other word in the clause namely "concur" in the expression "concur in a judgment" really indicates by reference to the terms of the previous clause 1 that it is by the concurrence in opinion that the judgment of the court results and thus therefore we arrive at a concurrence in a judgment.

Having regard to the context, the word "judgment" in this clause should be construed merely as referring to the final decision, or in other words to the decretal portion.

The matter might also be tested in a slightly different manner. I have already referred to the fact that the expression "majority" must necessarily be regarded as including unanimity of opinion. If so, if two Judges should agree that in respect of certain matters a decree appealed from should be varied or reversed, can it be said that there is no majority which concurs in a judgment varying or reversing? No doubt if the use of the word "judgment" in the second clause in contradistinction to the opinion of the Judges in the first clause, should be entirely ignored, then there might be some room for such a contention. If the expression "majority" in the second clause should be limited only to cases where there is a majority and therefore a dissenting majority, then the *reductio ad absurdem* would be that even if three Judges sit together and concur in a judgment varying or reversing a decree, the decree should only be confirmed because it is not a mere majority that is in favour of varying or reversing.

The only reasonable construction therefore, having regard to all the terms employed in both the clauses, is that if a Bench of two Judges should be of the same opinion with regard to varying or reversing a decree with respect to certain matters, there is

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such a concurrence in a judgment varying or reversing the decree appealed from and therefore the contingency does not arise whereon alone the decree appealed from should be confirmed in its entirety. The opinions of the Judges therefore being contained in the judgments respectively delivered by them, the judgment or decision should be regarded to be confined to and made to comprehend all matters with regard to which they agree to reverse or modify the decree appealed from.

I find that in an unreported case Appeal No. 223 of 1920, my learned brother and Justice Venkatasubba Rao have arrived, even though without any elaborate discussion, at the same view and conclusion with regard to the contention now raised before us.

I have therefore the less hesitation in following the decision in that case. A decree will therefore be drawn up in these Appeals varying the decree appealed from in the manner and to the extent both of us have agreed.

N. S. *Appeals allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Bodipatti Lalamma and two others ... *Petitioners* (Accused).*

Lalamma, *In re.*

Bench of Magistrates—Conviction by majority of, President being for acquittal—Judgment by member of majority in case of—Necessity—Conviction based on acquitting judgment of President—Legality of.

In a case tried by a Bench of Magistrates, the President of the Bench was for acquittal, the majority being for conviction. But the President alone wrote a judgment, which, of course, was an acquitting judgment, and the accused was convicted.

Held, that the judgment did not conform to the law and that the conviction must be set aside.

Under the Criminal Procedure Code the reasons for conviction must be set out. There cannot be a conviction based on an acquitting judgment.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Bench of Magistrates of Narasaraopet in B. C. No. 224 of 1926.

Ch. Raghava Rao for petitioners.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—In a case where the President of the Bench is in a minority as to conviction or acquittal, the judgment should

*Crl. R. C. No. 849 of 1926. 3rd February, 1927.

Lalamma, *In re.*

be written by some member of the majority. Otherwise, as in the present case, we have a conviction based on an acquitting judgment, and we are left without any reasons for conviction which, under the provisions of the Criminal Procedure Code, the Bench is bound to set out. The judgment does not conform to the law and the conviction cannot be upheld. It is hereby set aside. The fines, if paid, should be refunded.

It is not a case for ordering retrial.

A. S. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

C. T. Narasa Reddi ... *Petitioner* (Appellant)*

v.

Hajee Tar Mohammad Aycob Sait ... *Respondent.*

Narasa Reddi *v.* Mohammad Ayoob Sait.

Letters Patent, Madras—Clause 15—Judgment—Transfer of suit—Order refusing—Appealability of.

An order of a single Judge of the High Court refusing to transfer a suit from the City Civil Court, Madras, is not a judgment within the meaning of clause 15 of the Letters Patent and is not appealable. Such an order does not put an end to any right which the party enjoys, but merely leaves matters as they were before the application for transfer was made

Appeal under clause 15 of the Letters Patent against an order of Jackson, J., in C. M. P. No. 4451 of 1926, refusing to transfer O. S. No. 275 of 1926 from the file of the City Civil Court, Madras, to the District Munsif's Court of Vellore.

The material facts appear from the judgments.

Walrap S. Subramanya Aiyar for appellant.

G. Krishnaswami Aiyar for respondent.

The court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is a Letters Patent Appeal from the order of Mr. Justice Jackson, dated the 22nd February, 1927, refusing to transfer the suit of the plaintiff Hajee Tar Mahomed Ayoob Sait from the City Civil Court to the Court of the District Munsif of Vellore. Hajee Tar Mahomed and the defendant in the City Civil Court suit, C. T. Narasa Reddi, did business together and the City Civil Court suit alleges that the defendant owes the plaintiff a sum of about Rs. 1,300. Subsequently, C. T. Narasa Reddi filed a suit in the Vellore Court

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*L. P. A. No. 109 of 1927. 24th March, 1927.

Narasa Reddi v. Mohammad Ayoob Sait.

Odgers, J

against Hajee Tar Mahomed Ayoob Sait, alleging that on the other hand a sum of about Rs. 700 was due to himself. Narasa Reddi moved the High Court to transfer the City Civil suit to the Vellore Court. This was refused and the matter now comes before us on Letters Patent Appeal. Now the question is whether this is a matter within the purview of the Full Bench case in *Tuljaram Rao* v. *Alagappa Chettiar* (1). This case has recently been considered and its meaning expressed by the present Chief Justice and Mr. Justice Ramesam in *The Official Assignee of Madras* v. *Ramalingappa* (2). The present learned Chief Justice recognised that the question is a difficult one and adopts the language of Sir Arnold White, *i.e.*,

"If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause".

And later the learned Chief Justice observes that

"If the effect of the order is to allow the proceedings to go on it is impossible to say that it satisfies the test laid down by Sir Arnold White in the Full Bench case".

Now on the objection that no Letters Patent Appeal lies it appears to me that applying this principle matters are left exactly as they were and that it is that that distinguishes this case from the case in *Krishna Reddi* v. *Thanikachala Mudali* (3) (Sir Walter Schwabe, C. J., and Mr. Justice Ramesam) which is a case similar in this way, namely, that the order of a Judge is there said to be a judgment within Article 15 of the Letters Patent and therefore appealable and this is put on the ground that in that case the Judge by his order put an end to the case as it stood in Chingleput and conferred a jurisdiction on this court in respect of that particular case. It seems to me that the case before us is different and that the order of the learned Judge does not put an end to any of the rights of the parties and the effect of the order now appealed from is to allow the proceedings to go on. I therefore think that on this ground it must be held that the Letters Patent Appeal so far as the order refusing to transfer is concerned does not lie and the party has no right to have the case transferred. The Letters Patent Appeal is dismissed with costs.

The C. M. P. No. 1033 of 1927 is also dismissed but without costs.

1. (1912) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1926) 50 M L J 361.
3. (1924) I L R 47 M 136 . 45 M L J 153.

Narasa Reddi v. Mohammad Ayoob Sait.

Curgenven, J.

Curgenven, J. :—I agree. It may be conceded that an order transferring a suit would amount to a judgment within S. 15 of the Letters Patent on the ground explained by Sir Walter Schwabe, C. J., in *Krishna Reddi* v. *Thanikachala Mudali* (3) namely, that it terminates the case in one court and creates a jurisdiction in the other to try it. The learned Chief Justice's view was based primarily upon the construction put upon the word "judgment" in the Full Bench Case *Tuljaram Rao* v. *Alagappa Chettiar* (1) and applying that construction it seems to me that the nature of the order now under consideration was not to put an end to any right which the party enjoyed to have the suit transferred, because, in fact, he had no such right, but that it was simply to leave matters as they were before the application was made. In *D. K. Asher* v. *V. C. Gopalaratnam* (4), Kumaraswami Sastriar, J., considered the effect of certain orders refusing to grant various prayers, such as for the issue of a commission, the raising of an issue, or to amend the pleadings, and in the actual matter before him, which was a refusal of an application to grant inspection, he held that it would come within the same category and so would be unappealable, basing his judgment upon the test proposed in the Full Bench case. Similarly in *Official Assignee of Madras* v. *Ramalingappa* (2) the present learned Chief Justice, applying the same definition, concluded that if the effect of the order in question is to allow the proceedings to go on as before it does not amount to a judgment within the clause. I think the order in this case answers to the same test and accordingly that it is not appealable. I agree therefore that the appeal should be dismissed with costs. The C. M. P. also will be dismissed but without costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

The Public Prosecutor ... *Appellant**

v.

Bysani Ramasubbayya Chetty ... *Accused.*

The Public Prosecutor v. Ramasubbayya Chetty.

Abkari Act (I of 1886), S. 55 (1)—Sale within meaning of—Actual delivery of thing sold—Necessity—Taking money and bringing out bottle for being handed over to purchaser if enough

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*Crl. Appeal No. 475 of 1927. 13th October 1927.

1. (1912) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1926) 50 M L J 361.
3. (1924) I L R 47 M 136 : 45 M L J 453.
4. (1927) 52 M L J 192.

The Public Prosecutor v. Ramasubbayya Chetty.

To constitute a sale within the meaning of S. 55 (1) of the Abkari Act, it is not necessary that there should be an actual delivery of the thing sold. Taking the purchase money and bringing the brandy bottle out for the purpose of handing it over to the purchaser constitute an offence under S. 55 (1) of the Act.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sub-divisional 1st Class Magistrate of Chittoor in C. A. No. 14 of 1927 on his file (C. C. No. 25 of 1927 on the file of the Court of the Stationary Second Class Magistrate of Madanapalle).

The Public Prosecutor for the Crown.

E. Krishnamurthi for accused.

The Court delivered the following

JUDGMENT :—This is an appeal by the Government against the order of the Sub-divisional First Class Magistrate of Chittoor, acquitting the counter-petitioner who was convicted by the Second Class Magistrate of Madanapallee under S. 55 (1) of the Abkari Act. The learned Sub-divisional Magistrate found the facts as alleged by the prosecution but acquitted the counter-petitioner solely on the ground that there was no delivery of the brandy bottle to the buyer. Under S. 55 (1) of the Abkari Act, I of 1886, it is an offence for any one to sell any liquor or any intoxicating drug in contravention of the provisions of the Act. The word "sell" is not defined; but "sale" or "selling" is defined as including any transfer otherwise than by way of gift. The contention of the Public Prosecutor is that for the purpose of a sale it is unnecessary that there should be actual handing over of the property sold. Under the Contract Act there can be a sale without actual delivery of the goods sold. I do not think that the word "sell" in S. 55 of the Abkari Act is used in any sense different from that used in the Contract Act. A sale is complete as soon as the price is paid or agreed to be paid for ascertained goods. It is not necessary for a completed sale that there should be an actual delivery of the thing sold. In this case there is satisfactory evidence which is accepted by both the lower courts that the counter-petitioner took some money through his son from P. W. 3 and brought out a half brandy bottle, and, when he was actually handing it over to P. W. 3, he was arrested by P. W. 1. Taking the money and bringing the bottle out for the purpose of handing it over to P. W. 3 constitute an offence under S. 55 (1) of the Abkari Act. I therefore set aside the order of acquittal passed by the Sub-divisional Magistrate and I impose a fine of Rs. 50 on

The Public Prosecutor v. Rama-subbayya Chetty.

the counter-petitioner and in default of the payment of fine two weeks' simple imprisonment.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Appala Naidu, *In re.*

Bontu Appala Naidu and six others ... *Petitioners** (*Accused*).

Criminal Procedure Code, S. 247—Complainant in summons case—Death of, during course of enquiry—Procedure on—Acquittal of accused—Proceeding with enquiry—Jurisdiction of Magistrate.

Where, in a summons case, the complainant dies during the course of the enquiry, the Magistrate should acquit the accused and ought not to proceed with the enquiry.

The clause in S. 247 of the Criminal Procedure Code beginning with the words "unless for some reason he thinks etc." cannot apply to the case of a complainant who is dead.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Parvatipur Division in Criminal Appeal No. 2 of 1927 preferred against the judgment of the Court of the Taluk Magistrate of Bobbili in C. C. No. 40 of 1926.

K. Kameswara Rao for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—In this revision petition a very interesting question is raised. The complainant died pending the enquiry into the case. The case before the Magistrate was a summons case, and the contention of Mr. Kameswara Rao is when the Magistrate was told that the complainant was dead he should have dismissed the complaint under S. 247 of the Code of Criminal Procedure for the non-appearance of the complainant. The Magistrate adjourned the case in order to enable the complainant's son to come on the record, and the learned Public Prosecutor contends that the Magistrate's action is not *ultra vires* as the section deals with complainants who are alive and not with complainants who are dead. The relevant portion of S. 247 is

"if the complainant is absent, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

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*Crl. R. C. No. 627 of 1927. 14th October, 1927.
(Crl. R. P. No. 467 of 1927)

Appala Naidu, *In re.*

The Magistrate adjourned the case in order to enable complainant to appear and not for any other reason. If the complainant is dead he could not appear before the Magistrate and therefore the clause beginning with the words "unless for some reason he thinks etc.," cannot apply to the case of the complainant who is dead. In this case the complainant being dead during the course of the enquiry the Magistrate should have acquitted the accused and should not have proceeded with the enquiry. I may in this connection refer to *Purna Chandra Moulik* v. *Dengar Chandra Pal* (1). I therefore set aside the conviction and direct the fine if paid to be refunded to the accused.

A. S. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[*Insolvency.*]

PRESENT :—MR. JUSTICE WALLER, IN CHAMBERS.

In the matter of R. K. Abdul Rahim Sahib and Co. ... *Insolvents**
The Official Assignee of Madras.
v.
G. Ramanujiah ... *Garnishee.*

In the matter of R. K. Abdul Rahim Sahib & Co.

Presidency Towns Insolvency Act (III of 1909), Ss. 7 and 36—Debtor to insolvent's estate residing over 200 miles from court-house—Power of Court to issue summons compelling him to attend and give evidence.

The Insolvency Court has power to issue summons to a person who is supposed to be a debtor to the insolvent's estate and who is residing over 200 miles from the court-house, compelling him to attend court and give evidence.

Quaere : Whether the Insolvency Court has power to issue summons to a witness (stranger who is not a party to the insolvency proceedings) residing over 200 miles from the court-house to attend court and give evidence.

Application for summons against Goday Ramanujayya, Cloth Merchant, Amalapuram, Godavery District.

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*In an interlocutory application in I. P. No. 182 of 1922. 12th March, 1928.

1. (1913) 19 C W N 334.

In the matter of Abdul Rahim Sahib & Co.

The application coming on before the Master (Mr. G. S. White) in the first instance, he referred the matter to the Court by the following

ORDER :—The question originally raised was as to the regularity of issue of this summons and whether the Official Assignee is entitled to apply for the issue of a summons, under S. 36 of the Act, to compel a witness under that section to appear when such witness resides at a distance of over 200 miles from the court-house. In other words, can a summons be issued under S. 36 to compel a witness residing over 200 miles from Madras to attend and give evidence.

After the argument had been addressed to me on this section Mr. V. Vaardaraja Mudaliar, on behalf of the Official Assignee, said that the summons in this case was not issued or applied for under S. 36 of the Act, but was applied for under S. 7 of the Act, or, in the alternative, that it was applied for under either S. 36 or S. 7. As the matter has been fully argued before me, I shall record my views on both sections and discuss the various authorities cited before me.

The first case referred to is the judgment in O. S. A. No. 30 of 1917. That is an unreported case in which it was held that a summons under S. 36, when it merely asks for production of documents, can be issued, as there is no question of the attendance of a witness, as it is always possible for the documents required to be sent by post or by a messenger. That decision does not decide that the Court has, or has not, power to issue a summons to compel the attendance of a witness, who resides over 200 miles from Madras, but it merely draws a distinction between a summons to produce and a summons to attend and give evidence and holds that a summons to produce, whether under the Code or under S. 36 of the Insolvency Act, can be issued, as the order can be complied with by causing the document to be produced, which, under O. 16, R. 6 of the Code, is a sufficient compliance of the summons. The judgment, therefore, cannot be looked upon as a decision that a summons to give evidence under S. 36 can, or cannot, be issued where a witness resides more than 200 miles from Madras. The important words in that decision appear to be the portion in which it is stated that reading sections 36 and 37 of the Insolvency Act together and also the Original Side Rules, the Court is governed by O. XVI of the Code and by the Original Side

In the matter of Abdul Rahim Sahib & Co.

Rules in respect of orders under S. 36. Mr. V. Varadaraja Mudaliar contends that S. 36 is not controlled by the provisions of the Code. He contends that the Insolvency Court is constituted under clause 18 of the Letters Patent. I do not agree with him. The Court for the Relief of Insolvent Debtors was established by the Act of 1848, which was in force before the Letters Patent were framed. What happened was that certain laws are constituted by certain enactments relating to insolvent debtors in India and clause 18 provides for the execution by one of the Judges of the High Court of the laws relating to insolvent debtors. I shall refer later to some cases cited by Mr. V. Varadaraja Mudaliar in which it had been held that Insolvency Courts in India have jurisdiction throughout the British dominions, but it should be noted here that, if the Insolvency Court has jurisdiction throughout the British dominions, the wording of clause 18 of the Letters Patent only gives the Judge in insolvency power to exercise jurisdiction within the Presidency of Madras. The point, however, I wish to emphasise is this. The Insolvency Court, or the Court for the Relief of Insolvent Debtors, is not constituted by clause 18 of the Letters Patent, but that that clause gives one of the Judges of the High Court the power to exercise jurisdiction under the Insolvency Act. Jurisdiction to grant relief to insolvent debtors in India is derived from an Act of Parliament of 1829 known as the first Indian Insolvent Act. The court has a separate existence from the Supreme Court, but it was presided over by a Judge of the Supreme Court. In 1848 the Indian Insolvency Act was passed and the Insolvency Courts were continued by it and the court was to be held on before any one Judge of the Supreme Court. This Act of 1848 was in force in 1862 when the High Court was established and the effect of clause 18 is to give a Judge of the High Court instead of a Judge of the Supreme Court power to exercise jurisdiction in the Insolvency Court. Similarly under the present Act, S. 3, it is provided that the court having jurisdiction in insolvency under the Act shall be the High Court and that the jurisdiction shall be exercised by one of the Judges assigned by the Chief Justice under S. 4.

Under the old Act, therefore, the Insolvency Court was established by the Act and the Judges of the Supreme Court and later the High Court were authorised by the Letters Patent to exercise jurisdiction. Under the present Act jurisdiction is given by the Act and it is to be exercised by the Judge assigned by the Chief Justice.

In the matter of Abdul Rahim Sahib & Co.

So far as the framing of rules is concerned, S. 76 of the Indian Insolvency Act, 1848, gave power to His Majesty's Supreme Courts to make all necessary and reasonable rules not inconsistent with the provisions of the Act for facilitating and carrying into effect the relief intended to be given by the Act, and under the present Act, S. 112, the courts having jurisdiction under the Act, that is, High Courts, have power to make rules for carrying into effect the objects of the Act. I do not consider it necessary for me to state here whether the High Court has power to frame a rule to the effect that a summons may be issued under S 36 to compel a witness, who resides more than 200 miles from Madras, to attend and give evidence. It is sufficient for me to state that whether the court has, or has not, this power, it has framed no rules to this effect. There is nothing in the insolvency rules on the subject and it is therefore necessary to refer to the Original Side Rules to determine the question, as, under S. 90 of the Presidency Towns Insolvency Act, it is provided that, in proceedings under the Act, the court shall have like powers and follow the like procedure, as it follows in the exercise of its ordinary civil jurisdiction.

Has the High Court, in the exercise of its ordinary original civil jurisdiction, provided for a procedure by which a witness, who resides at a distance of more than 200 miles from Madras, can be compelled to attend before it? There is no such rule on the Original Side and the practice is not to issue subpoenas to witnesses, who reside more than 200 miles from the court, to attend. The question, however, is not one of practice. O. 1, Rule 3 of the Original Side Rules, provides that "the provisions of the Code so far as such provisions are inconsistent with these rules and forms are repealed." In other words, the provisions of the Code apply to the Original Side unless they are inconsistent with the rules. It is only necessary to refer to Ss. 117, 121 and 129 and O. 49, R. 3 of the Code, to see that this is so. The Code is generally applicable to the High Court in the exercise of its ordinary original civil jurisdiction except where it is specifically excluded, or where the High Court itself has made rules superseding any particular provisions of the Code.

The result is that O. 16 of the Code (with the exception of rule 2 of the Order, which has been excluded by O. 49, R. 3 (3) of the Code) applies to the High Court in the exercise of its ordinary original civil jurisdiction and that the Insolvency Court must follow the same procedure under S. 90 of the Act. The Insolvency Court has not by its rules provided for

a procedure under which a witness, who resides more than 200 miles from Madras, can be compelled to appear before it. I, therefore, hold that a summons cannot be issued to a person, who resides more than 200 miles from Madras, directing him to attend and give evidence under S. 36.

In the matter of Abdul Rahim Sahib & Co.

The decision cited by Mr. V. Varadaraja Mudaliar, *In re Coswasjee Ookerjee* (1), does not, in my opinion, apply. In that case, the application was to direct the insolvent, who had submitted to the jurisdiction of the court, to attend for examination. In the present case, the application is to direct a stranger to the insolvency proceedings to attend before the court and the Insolvency Court has wider powers to enforce the attendance of an insolvent than it has over a stranger to the proceedings. In *In re Naoroji Sorabji Talati* (2) it was held that the Insolvent Debtors' Court at Bombay can order the examination of the witness in Shanghai, but cannot direct a witness at Shanghai to come to Bombay to be examined. The position in the present case is practically the same as, although the court can order the examination of the witness, there is no machinery by which he can be compelled to attend. In *In re Ganeshdas Panalal* (3) it was also held that the court has jurisdiction to make an order under S. 26 of the old Act against persons holding the property of the insolvent and who are outside the Bombay Presidency. The question in the present case is not the distance to which the orders of the court extend, but up to what distance the attendance of a stranger to the insolvency can be enforced. Again the decision in *Official Assignee, Bombay* v. *Registrar, Small Causes Court, Amritsar* (4) lays down that the Imperial Act conferred jurisdiction upon the High Courts in Insolvency over the whole of India and for some purposes over much wider limits. The question in the case was whether the property in the Punjab had vested in the Court so as to exclude the operation of the Bombay vesting order, and the Privy Council held that the property had vested in the Official Assignee, Bombay. The case is not of much assistance in disposing of the present question. The case *Abdul Khader* v. *Official Assignee, Madras* (5) relates more to jurisdiction than to procedure and it decides that the court has jurisdiction to adjudicate on claims relating to immoveable property situate outside the limits

1. (1888) I L R 13 B 114.
2. (1908) I L R 33 B 462. 3. (1908) I L R 32 B 198.
4. (1910) L R 37 I A 86 : I L R 37 C 418 at 423 : 20 M L J 432 (P C).
5. (1916) I L R 40 M 810.

In the matter of Abdul Rahim Sahib & Co.

of the ordinary original civil jurisdiction. There is nothing in that decision to indicate whether or not a witness, who resides over 200 miles from the court, can be summoned to attend and give evidence. The Full Bench decision in I. P. No. 267 of 1923 affirms *Abdul Khader* v. *Official Assignee, Madras* (5), and holds that the Insolvency Court has jurisdiction under S. 7 of the Act to decide questions in insolvency where the garnishee lives outside its jurisdiction and that clause 12 of the Letters Patent does not affect the provisions of clause 18.

I do not think that the question that the court has a discretionary power to decide claims to property or claims against persons outside its jurisdiction is material to the present question, which is whether the court can enforce the attendance of a witness.

The second point raised by Mr. V. Varadaraja Mudaliar in his argument is that his summons is not being issued under S. 36, but under S. 7 of the Act. On this point, I say that S. 7 merely confers jurisdiction to decide all questions that may arise in an insolvency, but it does not provide for a procedure by which strangers to the insolvency proceedings can be brought before the court. The only section, which so provides, is S. 36. I, therefore, hold that a summons cannot be issued under S. 7 of the Act.

After I had passed the above order, Mr. Albuquerque drew my attention to a case, not cited by Mr. V. Varadaraja Mudaliar, *Dinaram Somani* v. *Bhim Bahadur Singh* (6), in which it has been held that the High Court, Calcutta, has jurisdiction to summon witnesses residing more than 200 miles from Calcutta under S. 36 and that O. 16, R. 19 of the Code of Civil Procedure, does not apply to summonses under S. 36. This decision is in conflict with the judgment in O. S. A. No. 30 of 1917 of the Madras High Court in which it has been held that, in respect of orders under S. 36 of the Act, the court is governed by the provisions of O. 16 of the Code and by any rules relating to the same matter to be found in the Original Side Rules.

The result of all the decisions appears to me to indicate that the High Court has jurisdiction to try questions that arise even though they arise over 200 miles from Madras and jurisdiction to examine witnesses residing over that distance, but there is no procedure or machinery by which a witness can be compelled to come to Madras from a distance of over 200 miles.

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5. (1916) I L R 40 M 810. 6. (1923) 27 C W N 370.

In the matter of R. K. Abdul Rahim Sahib & Co.

As, however, the matter is one of great importance to the Official Assignee and to the profession, I think the most satisfactory course is to refer the matter to the Court for a ruling.

S. Doraiswami Aiyar instructed by *V. Varadaraja Mudaliar* for the Official Assignee, Madras.

The Court delivered the following

JUDGMENT :—I say nothing about the case of a person who is to be summoned as a mere witness under S. 36 of the Act, for that case does not arise. The person to be summoned here is not a mere witness, but a person supposed to be a debtor to the insolvent's estate. There is, as was observed in *In re Appleton, French and Scrafton, Ltd.* (7), a litigation between him and the Official Assignee. *Vide* also *Ex parte Waddell : In re Lutchscher* (8) where the same distinction is made. My answer to the reference is that the court has jurisdiction to summon the party.

Taxed costs out of estate.

N. S. *Reference answered affirming the jurisdiction of the Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Nallaperumal Pillai ... *Appellant** (*Defendant*)

v.

Sakul Hamed Maracayar and others .. *Respondents* (*Legal Representatives of plaintiff since deceased*).

Nallaperumal Pillai v. Sakul Hamed Maracayar

Civil Procedure Code, S. 47—Person originally impleaded as defendant but subsequently removed from record—Orders passed in execution of the decree—If can be said to relate to execution of the decree so far as he is concerned—Subsequent suit by such person—If barred—"Arising between the parties to suit"—Meaning of.

Where a person who was originally joined as a defendant to the suit was subsequently removed from the record at some stage of the suit for some reason, the court must be taken not to have regarded, or wished to regard, him as a person sought to be bound by the adjudication in the suit and by the decree eventually passed in the suit and he cannot be re-

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*S. A. No. 11 of 1925. 20th September, 1927.

7. L R (1905) 1 Ch. 749.

8. (1877) L R 6 Ch. D 328.

Nallaperumal Pillai v. Sakul Hamed Maracayar.

garded as a person bound by the adjudication, not having been a party to the proceedings at the time of the adjudication and therefore not a party to the decree then, and, consequently, any matter arising thereafter cannot be regarded as relating to the execution of the decree so far as he was concerned so as to bar a subsequent suit by him to establish his rights.

Per Srinivasa Aiyangar, J.—The expression "arising between the parties to the suit" in S 47 of the Civil Procedure Code undoubtedly contemplates their having continued to be parties to the suit, at any rate, up to the stage at which the question arises. The expression would be inappropriate if it should be referable to a question arising between one who is a party to the suit and another who has ceased to be a party to it by order of court.

Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A. S. No. 9 of 1924 (A.S. No. 517 of 1923, District Court of Tinnevelly), preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 702 of 1921 (O. S. No. 537 of 1920 of the District Munsif's Court, Tuticorin).

K. V. Sesha Aiyangar for appellant.

B. Sitarama Rao and *A. Swaminatha Aiyar* for respondents.

The Court delivered the following Judgments:—

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The main ground argued in this second appeal on behalf of the appellant who is the 1st defendant in the suit from which this second appeal has arisen is that the lower courts were wrong in holding that the plaintiff's suit was not barred by the provisions of S. 47 of the Procedure Code. For the purpose of making good an objection on the footing of that section it is necessary to make out two matters : first, that the person who comes in as plaintiff in the subsequent suit was a party to the suit in which the decree was passed within the meaning of S. 47 of the Code and secondly, that the subject-matter of the suit was one relating to the execution, discharge or satisfaction of the decree in the previous suit. Mr. K. V. Sesha Aiyangar, the learned vakil for the appellant, wished to argue both the positions, namely, that the plaintiff in this suit must in law be regarded as having been a party to the previous suit within the meaning of S. 47 of the Code and also that the subject-matter of the present suit is one relating to the execution, discharge or satisfaction of the decree in the previous suit. We intimated to him that he might for the purpose of this argument take it that the present plaintiff was a party to the previous suit within the meaning of S. 47 and asked him to argue how even on such a basis he proposed to establish that the subject-matter of this suit was a matter relating to the execution, discharge or satisfaction of the decree. The facts

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were that though the present plaintiff was made in that plaint party 2nd defendant, still it is clear from the record that his name was at some stage and for some reason ordered to be struck off. Therefore he was not a person whom the court regarded or wished to regard as a person sought to be bound by the adjudication in the action and by the decree eventually passed in the suit. So much Mr. Sesha Aiyangar readily conceded, and indeed conceding it, he wished to build another argument thereon which I shall refer to later. If therefore he was a person who was not bound by the adjudication, not having been a party to the proceedings at the time of the adjudication and therefore was not a party to the decree, then, can it be said that any matter arising thereafter could be regarded as relating to the execution of the decree so far as he was concerned? From the plaint in the previous action it is clear that the plaintiff sought to make him a party because he had got effected an attachment of some of the properties, the subject-matter of the suit and subject of the mortgage on which the suit was based. Therefore the plaintiff at that stage required that any matters in contest between them regarding the right under which he had obtained the attachment should be adjudicated by the court in that very suit. But having regard to the order directing that his name should be struck off we must take it that for some reasons, right or wrong, the court refused to adjudicate with regard thereto and thereby adjudicated that very decree that may be passed in the suit would not be binding on him and should not be regarded as affecting his interests in any manner or degree. After such an adjudication it is impossible to say that any matter that may arise in execution of the decree to which he was not a party could be regarded as relating to execution, that is to say, relating to the procedure by which the decree passed in the suit is being carried out. The learned vakil for the appellant has referred to two cases. The first case cited by him was *Sadanand Panaey* v. *Sheik Tufail Ahmad* (1). In that case the person who was held to have been a party within the meaning of S. 47 had not only been made a party to the suit, but had failed to raise any defence to the action or the claim of the plaintiff which he could have done by way of defence. This is clearly indicated by the learned Judges in that case at page 116, 2nd column, where they use the following words about

"the right of equity of redemption which he could or could not exercise as he desired and which, as a matter of fact, he did not exercise."

1. (1920) A. I. R. 1923 All. 115.

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No doubt later on they proceed to point out that he could have raised the objection in the course of execution. Strong reliance has been placed by Mr. K. V. Sesha Aiyangar on these observations. But there are no materials before us with regard to the facts of this case on which we could say whether the nature of the objection was such that it could have been reasonably raised in the course of execution even though the party had failed to take it or make out by way of defence in the action. That decision therefore cannot possibly be regarded as at all applicable to the present case because that was the case of execution of the decree which obviously was in the circumstances of the case binding on the party who as plaintiff subsequently instituted the suit. The other case cited by the learned vakil for the appellant was *Nand Kishore* v. *Sultan Singh* (2). In that case the question whether it was not open to the person who subsequently filed the suit as plaintiff and who was also a party to the previous suit to have set up his title by way of defence to the action and on his failure to do so he had not forfeited the right of setting up such title afterwards was not argued at all. It does not at all appear to have been taken before the learned Judges. The decision in the case does not refer to any such question and does not deal with it. The decision itself is based ultimately not on S. 47 but on R. 92 of O. 21 of the Procedure Code. That decision therefore cannot also be regarded as applicable to the present case. S. 47 of the Code refers to all questions arising between the parties to the suit in which the decree was passed. The expression "arising between the parties to the suit" undoubtedly contemplates their having continued to be parties to the suit, at any rate up to the stage at which the question arises. The present participle "arising" is the word used, and the expression "arising between the parties to the suit" would be inappropriate if it should be referable to a question arising between one who is a party to the suit and another who has ceased to be a party to it by order of court. That alone can be regarded as relating to the execution of a decree which is concerned with carrying out the provisions of the decree, and if as in this case the court deliberately sent a party out and refused to make him any party to the adjudication which it might make in the action, then it follows logically that any title or right which he may have to set up and which the court refused to adjudicate upon cannot be regarded as coming under the expression "execution

2. (1925) I L R 7 Lah. 1.

of the decree". We must also observe that even though from the record it appears that the plaintiff's name had been struck off from the list of parties in the suit by order of court, still Mr. Sesha Aiyangar offered to argue the point that he must still in law be regarded as a party within the meaning of S. 47. In the view we have taken of the other question it has really become unnecessary to consider this point. The second appeal is therefore dismissed with costs.

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Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J. :—The appellant instituted a prior suit O. S. No. 495 of 1916 on the file of the District Munsiff's Court of Tuticorin against his mortgagor to recover money due to him under his mortgage. He made the present plaintiff 2nd defendant to that suit. Copies of the plaint in that suit as well as of the decree passed therein have been exhibited in the present suit as Exhibits II and II (*a*). In Exhibit II the plaint, there is a note against the 2nd defendant "removed from record". In the decree there is a statement that the 2nd defendant has been removed from the record. On this state of the record I am absolutely clear that the 2nd defendant in that suit who is the plaintiff in the present suit should not be taken to have been a party to that suit at all within the meaning of S. 47 of the Code. Mr. Sesha Aiyangar, however, argues that he must be taken to be some sort of party all the same. When the court declined in the previous suit to have the rights claimed by the then 2nd defendant adjudicated, I think it is not possible to hold that the 2nd defendant should have intervened in execution proceedings and sought to have the adjudication of his rights made there in execution proceedings under S. 47. The court having by its order, rightly or wrongly, removed the 2nd defendant from that suit, should be taken to have ruled that none of his rights could be adjudicated in that suit, which includes of course both the stage before the decree and the stage after the decree. I am therefore clearly of the opinion that in whatever sense he might be deemed to be a party, after his name had been removed from the previous suit, the present suit, in the circumstances, is maintainable as was held by the lower appellate court. I therefore agree with my learned brother that the second appeal should be dismissed with costs.

N. S. *Second appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS-TROTTER, *Kt., Chief Justice*, MR. JUSTICE WALLER, MR. JUSTICE JACKSON, MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE ANANTAKRISHNA AIYAR.

K. R. Subramania Aiyar and others ... *Appellants** (*Defendants* 1 *to* 3)

v.

Sabapathi Aiyar and another ... *Respondents* (*Plaintiff and* 10*th Defendant*).

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Subramania Aiyar
v.
Sabapathi Aiyar.

Hindu Law—Joint family—Simple creditor of father—Bona fide *partition between father and sons—Right of the creditor to recover the debt from the shares of the sons after partition*

Held by the Full Bench (*The Chief Justice and Srinivasa Aiyangar, J., dissenting*).—A simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons.

Jagannatha Rao v. *Viswesam*, (1924) I L R 47 Mad. 621 : 46 M L J 590, followed.

Karri Venkatareddi v. *Chelluri Satyanarayanamoorthi*, (1920) 40 M L J 473, overruled.

Peda Venkanna v. *Sreenivasa Deekshatulu*, (1917) I L R 41 Mad. 136: 33 M L J 519, explained.

Appeal against the decree of the Court of the Additional Subordinate Judge of Coimbatore in O. S. No. 4 of 1923 (O. S. No. 110 of 1919 on the file of the Court of the Principal Subordinate Judge of Coimbatore).

S. Varadachariar for *K. S. Champakesa Aiyangar* for appellants.

T. S. Rajagopala Aiyar for 1st respondent.

The Court (Kumaraswami Sastri and Ramesam, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—This Appeal was ordered by Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao to await the decision in the Full Bench reference in Second Appeal No. 1269 of 1923. The Full Bench did not think it necessary to decide the question of law raised. We think that having regard to the importance of the question raised and of the conflict of decisions in *Jagannatha Rao* v. *Viswesam* (1), *Peda Venkanna* v. *Sreenivasa*

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*Appeal No. 397 of 1924. 9th December, 1927.

1. (1924) I L R 47 M 621 : 46 M L J 590.

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Deekshatulu (2) and *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3) the following question should be referred to a Full Bench.:

"Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the fathei and the sons?"

We shall decide this appeal on the merits after receiving the opinion of the Full Bench.

T. M. Krishnaswami Aiyar for *K. S. Champakesa Aiyangar* for appellants.

K. S. Krishnaswami Aiyangar for *T. S. Rajagopala Aiyar* for 1st respondent.

The Court expressed the following

Coutts-Trotter, C. J.

OPINION :—*The Chief Justice* .—My general views on the subject of the pious obligation of the son to pay such debts of his father as are *vyavaharika* are to be found in several reported cases. So I content myself on this occasion with a summary statement of those propositions which I conceive to be established law and which lead up to the exact point which we are called upon to decide.

So far as I am aware, the obligation is a peculiar feature of Hindu law, and is not to be found in any other organized system of jurisprudence in the world. The obligation is based on a religious doctrine which I should imagine not to be regarded as tenable now-a-days by educated Hindus, even the most orthodox. Under the old Hindu law, the liability was a personal one resting on the son and doubtless did not operate upon him until after the father's death. A series of Privy Council decisions culminating in *Brij Narain* v. *Mangal Prasad* (4) have both extended and limited the old law. It has been extended in that the son's share of the undivided family property is made liable in execution of a decree given against the father during the latter's lifetime; and also in that the son can be impleaded jointly with the father in order that the question whether the debt was or was not *vyavaharika* may be settled in the suit and not left for discussion in the execution proceedings. It has been limited in that the son's liability has for many years been confined to his share of the joint family property.

So far I think we are in the domain of reasonably settled law. But the question was bound to arise and did arise: What is to

2. (1917) I L R 41 M 136 : 33 M L J 519.
3. (1920) 40 M L J 473.
4. (1923) L R 51 I A 129 . I L R 46 A 95 : 46 M L J 23 (P C).

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be the application of these principles to a case where a partition is effected between father and son after the father has contracted the suit debt, and the property consequently is divested of its character of joint family property and becomes the individual property of the father and son respectively, but where no provision is made in the partition for the discharge of the father's debt? It is said in several of the Madras cases that if the partition was a sham, a mere device to defeat those creditors who would otherwise be entitled to satisfy themselves out of the joint family property, the creditors' rights are not affected when the appropriate steps have been taken to set the partition aside. We have not been referred to any actual decision on the point, but I think we may assume that the view expressed is right for the simple reason that the effect of a determination that the act purporting to divest the property of its character as joint family property is to be set aside as a sham transaction is to declare that the property has never in truth lost its original character of joint family property. But what is to happen if, as in this case, the partition was honest in the sense defined by Ramesam, J., in *Jagannatha Rao* v. *Viswesam* (1), viz., that enough property was assigned to the father to satisfy the claims of his personal creditors? The point first came to a head in *Krishnasami Konan* v. *Ramaswami Aiyar* (5), where it was held that a decree obtained against the father alone could not be executed against the share of the son which had come to him in a subsequent partition. That decision has not been questioned so far as I know and it has stood for nearly 30 years and doubtless many titles to property are now founded upon it, so that even if I thought it wrongly decided I should not venture to disturb it. Next in order of date came the decision in *Ramachandra Padayachi* v. *Kondayya Chetti* (6). At first sight it appears to be a direct authority in favour of the respondent, but it clearly is not, because the debt there was not a personal debt of the father, but a debt incurred by him as manager of a Hindu joint family and obviously binding on the joint family property as it stood at the date of the debt, whatever subsequent dispositions of it were made. No question of the pious obligation of the son did or could arise. But the case is undoubtedly significant for a further reason, viz., that the ground of distinction from *Krishnasami Konan*

1. (1924) I L R 47 M 621 at 626 . 46 M L J 590.
5. (1899) I L R 22 M 519 : 9 M L J 197.
6. (1901) I L R 24 M 555.

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v. *Ramaswami Aiyar* (5) was taken that whereas in *Krishnasami Konan* v. *Ramaswami Aiyar* (5) the father alone was made a party to the suit, in *Ramachandra Padayachi* v. *Kondayya Chetti* (6) the son had also been impleaded and judgment had gone against him.

Following the history of the Madras cases, we next come to *Kameswaramma* v. *Venkatasubba Row* (7). There is no question that Wallis, J., in that case expressed the opinion quite definitely that a Hindu son is liable for his father's debt "to the extent of the joint family property which came to his hands at partition." Having regard to the actual decision, which on other grounds discharged the son, that was clearly an *obiter dictum*: and I do not think it is worth while to speculate whether the language used by the same learned Judge in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) is or is not to be regarded as showing that he had altered the view he had taken in *Kameswaramma* v. *Venkatasubba Row* (7) though the language used by him at page 141 would seem very strongly to suggest that he had. That brings us to *Jagannatha Rao* v. *Viswesam* (1) and there is no doubt that that case is a direct authority for the plaintiff, and all that we have to ask ourselves is whether we agree with it or not.

After the most anxious consideration, I have come to the conclusion that that case should not be followed. I have had the advantage of reading the judgment prepared by my brother Srinivasan, and he has dealt with the matter so fully, that I can give my own reasons briefly for arriving at the same conclusion. I think first that the doctrine of the pious obligation should not be extended beyond the point to which the cases have carried it. The doctrine is as I have said an illogical relic of antiquity unsuited to any but a primitive and patriarchal society. We have to apply it within the limits made binding upon us by the decisions, but I think we should refuse to go a step further. A father and his son can partition the joint family property and put an end to the father's power to alienate or charge any part of the property except that which has become his own absolutely by reason of the partition. The cases lay stress on the consideration that the creditor's right is nothing but a right to exercise such power over the property as is vested in the father. In effect, *Jagannatha Rao* v. *Viswesam* (1) imposes a fetter

1. (1924) I L R 47 M 621 · 46 M L J 590.
2. (1917) I L R 41 M 136 : 33 M L J 519.
5. (1899) I L R 22 M 519 : 9 M L J 197.
6. (1901) I L R 24 M 555. 7. (1914) I L R 38 M 1120 : 27 M L J 112.

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on the right to partition which to my mind is unwarranted either by principle or authority. The creditor's right is surely safeguarded amply by the power of the court in a proper case to declare a purported partition whose object is to defeat creditors to be a nullity. Or to put it in another way, the right of the creditor has always been exercisable only against that which at the time he exercises it was joint family property: either because there has been no attempt to partition it, or because the attempt made is void, and unavailing therefore to divest it of its original character.

I therefore would answer the question propounded in the negative, but as the majority of the court is of the contrary opinion the answer of the Full Bench will be in the affirmative.

Waller, J.

Waller, J. :—The question referred to us is :

"Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons?"

A further question seems to me to be considered and that is what is meant by a *bona fide* partition. What is meant is, I suppose, a real division of property between a father and his sons, not entered into with the dominant view of defeating the father's creditors. But, if the effect of the division is to defeat them—no provision having been made for the discharge of the father's legitimate debts out of the family assets—I do not see how such a partition can properly be described as *bona fide*.

On the question referred, two divergent views have been expressed by two Benches of this court. One is to be found in *Jagannatha Rao* v. *Viswesam* (1) and the other in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2). The former is directly in point and follows another decision of this court, *Ramachandra Padayachi* v. *Kondayya Chetti* (6) which seems to me to be equally directly in point. The latter—if a case is to be considered an authority only for what it actually decides—is not exactly in point, although I concede that both of the Judges who decided it gave utterance to opinions that are very much in point. The question for our consideration is which of these two divergent views should be followed.

The *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) view put shortly is this. The creditor's right to bring to sale the sons' shares for an antecedent debt is based on the father's right

1. (1924) I L R 47 M 621 : 46 M L J 590.
2. (1917) I L R 41 M 136 : 33 M L J 519.
6. (1901) I L R 24 M 555.

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to sell the sons' shares for such a debt. The father's right ceases on partition and "as the creditor can only work out the father's right at the date of the suit, he can have no right if that right is lost owing to a *bona fide* partition." The other view is that the only difference partition makes is that a creditor cannot, after it, on a decree against the father alone, proceed against the sons' shares in execution. On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition. The creditor advances money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his security by a transaction to which he was not a party and of which he was not aware? And what becomes of the son's pious obligation? It was binding as regards the particular debt before partition; does it cease to apply to the debt simply because there has been a partition? The obligation was, of course, at one time absolute. In the judgment of Muthuswami Aiyar, J., in *Ponnappa Pillai* v. *Pappuvayyangar* (8) occurs this passage :

"In II *Strange's* Hindu Law (second edition), a case is cited, in which a widow was sued for a debt contracted by her husband's father, who was dead, and her husband was also dead, but left a son who was only an infant. The law officer stated that failing the son, the grandson of him who contracted the debt was liable, consequently the infant would be liable when he came of age. In his remarks on this case *Colebrooke* observed that the grandson would not be liable, if he were separated from the family partnership. This view, it seems to me, is not consistent with the Hindu Law as expounded by the Mitakshara as to the character of the son's special obligation. Neither coparcenary relation nor the taking of assets is a pre-requisite."

The obligation was, then, originally absolute and not conditioned by the continuance of the coparcenary relation or by the taking of assets. The rigour of that rule has been relaxed to the extent of making the taking of assets a condition of its enforcement. We are now, it seems to me, being asked to relax it still further by declaring that the obligation is dependent on the continuance of the coparcenary relation. I concede that it does not attach to post-partition debts, but, as I have already observed above, I am unable to see why a partition should have the effect of detaching it from pre-partition debts. In point of fact, a proper partition does not extinguish the liability for such debts. On the contrary, it should provide for their discharge out of the joint property.

8. (1881) I L R 4 M 1 at 20 (F B).

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"The debt of his father . . . . . must be discharged by a parcener jointly with his kinsmen when partition is made"—*Katyayana.* The partition referred to in this quotation was a partition at the father's death, but though partition was subsequently allowed *inter vivos,* the principle has, I conceive, remained unchanged, that the sons must provide for the discharge of the father's legitimate debts. It has been suggested that the principle is sufficiently complied with if the share allotted to the father is large enough to satisfy those debts. The correct method, I think, is for the debts and the property to be shared equally. If that be so, it seems to me impossible for the sons—in a case where no provision has been made for the discharge of the father's debts at partition—to contend that they are not liable to be sued by the creditor. Had they done what was proper and provided for the discharge of those debts rateably among themselves, he could have sued them and they cannot take advantage of their own default in order to evade their obligation.

Having stated what I conceive to be the proper principle applicable, I will deal briefly with the case-law. It establishes definitely the proposition, that a creditor cannot in execution of a decree passed against a father alone on a pre-partition debt proceed against the shares allotted to the sons at partition. That —and nothing more—was laid down in *Krishnasami Konan* v. *Ramaswami Aiyar* (5). The proposition is based, reasonably enough, on the hypothesis that, the father's power to dispose of the sons' shares having ceased, the creditor could no longer exercise that power. The District Judge—afterwards a Judge of this Court—whose decision was appealed against and confirmed, pointed out that the creditor should have made the son a party to the suit. It was not necessary for the Appellate Judges to express any opinion on that view, but they did not, at any rate, dissent from it. The question we are now concerned with arose directly in *Ramachandra Padayachi* v. *Kondayya Chetti* (6) and it was decided against the son, the Bench holding that

"the son was liable only to the extent of the family property which had come to him under the partition."

It is said that the case is only an authority for the position that the son is liable for a family debt contracted before partition. If it decided something so self-evident and commonplace, the case would never have been reported. It seems to me clear that it decid-

5. (1899) I L R 22 M 519 : 9 M L J 107.
6. (1901) I L R 24 M 555.

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ed very much more than that. The *Krishnasami Konan* v. *Ramaswami Aiyar case* (5) was one of a father's personal debt and Bhashyam Aiyangar, J., pointed out in the course of the argument that if the son had been made a co-defendant the property which had fallen to his share would have been liable. In the judgment, again, the point of distinction between the two cases was emphasised. "The case relied on by the appellant, *Krishnasami Konan* v. *Ramaswami Aiyar* (5), is clearly distinguishable. In that case the suit was brought after partition against the father alone, and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father alone in such a suit. The case turned on the plaintiff's rights in execution, not, as here, on the question whether the plaintiff is entitled to judgment as against the son." This is all perfectly clear. The distinction between the two cases was not that one was of a personal debt and the other of a family debt, but that one was of executing against the son's share a decree passed against the father alone and the other of a suit against both father and son. There was no question in either of the creditor's right or the son's obligation; the only question was as to the proper method of enforcing them after partition. That is how I understand the decision in *Ramachandra Padayachi* v. *Kondayya Chetti* (6), and how it was understood by Wallis, J., in the next case, *Kameswaramma* v. *Venkatasubba Row* (7), where he quoted and approved it. The last was, from the creditor's point of view, a most unfortunate case. The trial court found that the partition was a deliberate fraud, the share allotted to the father being disproportionately small. The first appellate court came, on somewhat inadequate grounds, to a different conclusion. The High Court had therefore to proceed on the assumption that the partition was *bona fide* and followed *Krishnasami Konan* v. *Ramaswami Aiyar* (5). The son had not been made a party to the decree which was being executed after partition and his share was held not to be liable. I do not for a moment contend that this case is an authority in favour of the view that I am propounding, but it is important to note, with particular reference to the next case, that Wallis, J., quoted in his judgment, *Ramachandra Padayachi* v. *Kon-*

5. (1899) I L R 22 M 519 : 9 M L J 197.
6. (1901) I L R 24 M 555.
7. (1914) I L R 38 M 1120 : 27 M L J 112.

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dayya Chetti (6), with approval. The next case, *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) is, as I have already observed, not exactly in point, that is if a case is authority for nothing more than it decides. What it decided was this :

> "That a son is not liable . . . . . . on a promissory not executed by his father after partition in renewal of a note executed by the father before partition."

I grant that, on the language used by the learned Judges, their decision would probably have been the same if the note had not been renewed by the father after partition, but it is, I think, impossible to assert that that fact was not, to a very large extent, the real basis of their conclusion. Kumaraswami Sastri, J., regarded the renewal as a fresh obligation and Sir John Wallis gave as one of the grounds of his decision "that the father had no authority from the son to renew the note." No doubt his other ground was that the suit which had been brought against the father and the sons had been filed after partition. That ground seems to be inconsistent with the approval expressed by him of *Ramachandra Padayachi* v. *Kondayya Chetti* (6) in his judgment in *Kameswaramma* v. *Venkatasubba Rao* (7). That decision he did not consider at all—much less expressly dissent from—though it was a direct authority contrary to the conclusion he arrived at. Kumaraswami Sastri, J., did consider it, but distinguished it for the reason that it ought to have been decided on a ground which, I think, never occurred to the Judges who decided it. If the renewal by the father of the promissory note without the consent of the sons is to be regarded as a fresh obligation incurred after partition, *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) is not an authority for the position that a son cannot be sued after partition on a pre-partition debt contracted by his father. The latest case is *Jagannatha Rao* v. *Viswesam* (1) which lays down that the creditor can sue the son after partition on a pre-partition debt and recover it from the share allotted to him on partition. With respect I think that that conclusion is correct both on principle and on authority. With the authorities I have now dealt and the principle I have already stated. If a father, before partition, has incurred such debts as his sons are under an obligation to pay, two courses are open at partition. Either sufficient property must be allotted to the father in addition to his proper share to cover the sons' proportion of those debts

1. (1924) I L R 47 M 621 : 46 M L J 590.
2. (1917) I L R 41 M 136 : 33 M L J 519.
6. (1901) I L R 24 M 555.
7. (1914) I L R 38 M 1120 : 27 M L J 112.

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or the debts must with the property be divided equally between the co-parceners. If the first course be adopted, the sons, on being sued by a creditor after partition—the debt sbeing still unpaid—might—I do not say that they could—plead with success that they had discharged their obligation in full. If the debts have been provided for at the partition by making all the co-parceners equally liable, the creditors have, of course, a right of suit against all of them after the partition. If, on the other hand, neither of these courses has been adopted, if the property has been equally divided between the co-parceners and no provision whatever has been made for the sons' obligation to discharge the father's debts, I must confess that I can see no principle on which they should be allowed to escape from a liability, for the discharge of which they should have, but have not provided. They cannot plead the benefit of their own default.

In the result, I would answer the question referred to us in the affirmative. I may add that I cannot agree that *Brij Narain* v. *Mangal Prasad* (4) throws any light on it.

Jackson, J.

Jackson, J. :—The reference before us cannot be decided by any plain and direct rule of Hindu Law. That law lays down that a son is under pious obligation to pay the debts of his father; but the British Courts have not accepted the rule in its entirety. They have limited the obligation to the extent to which the son is possessed of family property. If it is joint family property, there is no difficulty : the law is clear that the son is bound. If it is family property, but divided family property, then the questions arise, has the law in these circumstances recognized the obligation, and is it an obligation which the law should recognize? To my mind the two questions are clearly connected; because if it is found that the general trend of the law has been to enforce the pious obligation even after partition, then I should hesitate to hold that merely out of regard for modern conditions the law should now be varied by judicial decision. Countless creditors will have legitimately reckoned the whole family property whether divided or undivided as available for their debts, and they ought not to be suddenly disappointed. A legislative enactment releasing the son in possession of divided property in regard to debts contracted after a certain date would be entirely a different matter. In *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) Kumaraswami Sastri, J., has treated partition as

2. (1917) I L R 41 M 136 at 143 : 33 M L J 519.

4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).

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analogous to a conveyance. If the father chooses, not in fraud of creditors, to alienate property, that is an ordinary risk which any creditor who has not got an actual charge upon the estate must be prepared to take. It is not open to him to say that he never expected alienation, nor is it any more open to him to say that he never expected partition. But I venture to doubt if the cases of partition and conveyance are quite parallel. The conveyance must be for family necessity; and a creditor may well say, I took the risk, such as it was, of an alienation for family necessity, but I never expected to be confronted with a partition, undertaken voluntarily and under no necessity, which has resulted in my debtor having only a fraction of the assets previously available. So that I think if the previous decisions of our Court have led creditors to expect that the family property will be available to them and not affected by partition, it is a legitimate expectation which we should not defeat on the ground that modern conditions may render the law obsolete.

In my opinion, to put them no higher, the rulings in *Ramachandra Padayachi* v. *Kondayya Chetti* (6) and *Kameswaramma* v. *Venkatasubba Row* (7) and *Jagannatha Rao* v. *Viswesam* (1) do establish a distinct trend of opinion that the son is under pious obligation notwithstanding partition to discharge the not immoral debts of his father incurred before partition. In *Ramachandra Padayachi* v. *Kondayya Chetti* (6) the plaintiff sued a father, who had incurred debt when trading on behalf of a trading family, and also his sons 2nd and 3rd defendants without alleging a cause of action which would entitle plaintiff to a personal decree against either son. But the lower court finding that the 2nd defendant was practically a partner passed against him a personal decree. 2nd defendant appealed. He successfully contended that no personal decree was asked for in the plaint, and he also tried to contend that in any case he was not liable for the debts of his father, though incurred before partition. For this plea he depended upon *Krishnasami Konan* v. *Ramaswami Aiyar* (5). But Bhashyam Aiyangar, J., at once repelled that suggestion. If the son in *Krishnasami Konan* v. *Ramaswami Aiyar* (5) had been made a co-defendant, the property, he said, which had fallen to the son's share,

1. (1924) I L R 47 M 621 : 46 M L J 590.
5. (1899) I L R 22 M 519 : 9 M L J 197.
6. (1901) I L R 24 M 555.
7. (1914) I L R 38 M 1120 : 27 M L J 112.

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would be liable... On this point respondent's vakil was not asked to reply and the appellant only succeeded in having the personal decree cancelled. As against the property which came into his hands after partition the decree stood.

It has since been suggested that, if the respondent had replied, he could have disposed of the appellant's case at once by pointing out that the debt was one incurred by the family manager on the family's behalf. He need not have relied upon any plea of pious obligation. That may be quite correct; but as a matter of fact the respondent did not reply, no such ground was apparently taken, and the appellant was defeated on his own ground that his pious obligation ceased at partition. When it was ruled that the pious obligation did not cease at partition there was no need for the respondent to say anything more.

In *Kameswaramma* v. *Venkatasubba Rao* (7) the father had stood surety in execution proceedings, and had become liable for the amount when the decree under which the execution had proceeded was reversed. His family land was attached, and his son objected, claiming that a subsequent partition had put him in exclusive possession of the property, which therefore was no longer liable for his father's debt. His claim was rejected and he brought a suit pleading that the property was not liable after partition. The trial court found that the partition was in fraud of creditors, and so the property was liable. The lower appellate court found that there was no fraud, and therefore the property was not liable. The 4th defendant who was practically the attaching creditor appealed to this Court, claiming that even though the partition was not fraudulent, the family property in the son's hands would still be liable.

The first ground of Second Appeal was:

"The lower court ought to have held (assuming that the partition between the plaintiff and defendant was not effected with the intention of defrauding creditors for evading execution) that the family property is liable in the hands of the son for the liability incurred by the father prior to the date of the partition."

This Court accepted that plea, holding that a Hindu son is liable for the surety debt of his father to the extent of the joint property which came to his hands at partition. But the respondent had another defence to the decree of the lower appellate court. Though the son might be liable if directly sued, was he liable, after partition, to execution, under a decree obtained

7. (1914) I L R 38 M 1120 : 27 M L J 112.

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against his father alone before partition? When the father had no longer the right to bring the property to sale, had the judgment creditor a higher right? On this plea the decree of the lower appellate court was upheld and the appeal was dismissed. But on the main ground taken in appeal the appellant succeeded and the Court held in terms (*vide* headnote) that the son is liable for the debt of his father to the extent of the joint family property which came to his hands at partition. So whether or no this be described as *obiter*, it did undoubtedly add distinctly to the previous trend of opinion. This again was followed in *Jagannatha Rao* v. *Viswesam* (1) to which I myself was a party, and which I merely cite as adding to this trend.

The only reasoned opinion to the contrary is that of Kumaraswami Sastri, J., in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2). His Lordship first lays down the generally accepted proposition that the strict rule of Hindu Law enjoins the pious obligation irrespective of possession of any assets; but it is now well settled that such obligation is circumscribed by the possession of assets. The difficulty is to discover what exactly is to be implied by assets. In the words of this judgment they are 'assets or joint family property' as though family property could only be reckoned as assets so long as it was held jointly, but not after partition. Yet is it not equally logical to reckon family property as assets after partition? No, it is argued, because if the father owing to partition has lost his power of dealing with the son's interest the creditor can be in no better position. But this argument would seem to assume that the creditor's claim is entirely based upon the father's power of dealing with his son's interests and not also based upon the pious obligation of the son. I fully see the force of the assumption if the creditor is trying to execute a decree obtained against the father alone against assets held by the son after partition, which the father has no present power to bring to sale. Then the creditor can be in no better position than the father. But I should hesitate to assume that the creditor's rights are equally circumscribed, when he has made the son a party to the suit, and, by virtue of the son's pious obligation, has obtained a decree against assets in the son's hands. His claim then is based upon the son's pious obligation, and, in my opinion, is not affected by the circumstance that the father has no longer

1. (1924) I L R 47 M. 621 : 46 M L J 590.
2. (1917) I L R 41 M 136 : 33 M L J 519.

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the power to sell. This is the distinction brought out in the headnote to *Kameswaramma* v. *Venkatasubba Rao* (7).

The argument then proceeds to the analogy between a partition and a conveyance which I mentioned at the outset, and it concludes with a reference to *Ramachandra Padayachi* v. *Kondayya Chetti*, (6) and *Kameswaramma* v. *Venkatasubba Rao* (7). The latter case is cited as authority for the proposition that the creditor 'has no right to proceed against the son's properties'; but it is also authority for the proposition that a Hindu son is liable for the debt of his father to the extent of the joint family property which came to his hands at partition.

As regards *Ramachandra Padayachi* v. *Kondayya Chetti* (6) it is noted that the liability was under a contract entered into for the benefit of the joint family, which is perfectly correct, but, as observed above, that was not the ground taken.

Thus to my mind there is no convincing rule of law nor line of argument which would justify a departure from the clear trend of previous rulings in this Presidency. I would reply to the reference in the manner proposed by Waller, J.

Srinivasa Aiyangar J.

Srinivasa Aiyangar, J. :—The question referred for the opinion of the Full Bench in this case is not only of considerable importance but is likely to arise frequently in the future. The question having been specially referred to a special Full Bench of five Judges in view of the conflict of opinion among the Judges of this Court, calls for a consideration on the principles of Hindu Law and the decisions of their Lordships of the Judicial Committee and cannot in my opinion be satisfactorily answered by a mere reference to the decided cases in this Court, many of which are at conflict with one another.

The question referred is in the following terms :

"Whether a simple creditor of a father in a Hindu joint-family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons?"

From the question so stated it follows that the joint family, before partition, was constituted only by the father and his sons, that the creditor did not under the contract with the father get any family property as security for his debt, that the debt was incurred by the father when the father was still the manager of the family and the family itself was undivided, that subsequently a valid partition was effected by and between the father and his sons, that such partition was *bona fide* by which we may

6. (1901) I L R 24 M 555
7. (1914) I L R 38 M 1120 : 27 M L J 112.

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understand that it was not a mere sham, was not unfair and was not also intended to defraud, defeat or delay the father's creditors. It is not possible to spell out any more from the question itself. One thing more however we may also assume, and that is, that the creditor wants for some reason to proceed to recover the debt due to him, not only from the father who is still alive and from the share allotted to him on partition, but also from the son, that is to say, from the property allotted to the son on partition.

From this fact alone the inference would not be reasonable that the property set apart for the father on partition was not sufficient to meet all the father's debts which were not immoral or illegal. On the other hand one may almost be inclined to take the view, that, if knowing the extent of the father's debts, the father was on partition left with property not sufficient to pay off all his proper or *vyavaharika* debts, the intention of the parties to the partition must have been to defeat or delay the creditors of the father. But as the basis on which the question has been propounded is that the partition has been effected in good faith and is fair, there are no materials before us on which one can say whether the anxiety of the plaintiff to proceed against the son's share is really because the father's share is at present insufficient to pay off and discharge the suit debt or has been prompted by some ulterior purpose. If there are numerous cases of partitions brought about with the sole object of defeating the father's creditors, cases also are not wanting in this country of fathers who, falling out with their sons, set up their creditors to proceed against and molest the sons. The observation, however, in this connection would not be improper that in cases in which the partition is found to be fair and in good faith the courts may have and exercise the power, at any rate, on the rule of justice, equity and good conscience, to require the creditor to proceed in the first instance against the father's share and to have recourse to the son's share only after the father's share should be exhausted.

As the question, however, has no reference to any such considerations, it has only to be answered on the true legal principles applicable to the case. I shall first deal with what I consider to be such legal principles and then proceed to discuss how far those principles have found acceptance or not in the decided cases.

The plaintiff in such cases is suing the son along with the father in order to recover a simple money debt due by the father.

The debt of the father lies in contract. There is no question of the obligation of the son being under the contract itself, as it may be in a case in which the contract is made or alleged to be made by the father in his representative capacity as manager and on behalf of the family. In a suit on a contract by the father, the son is, properly speaking, not a proper party at all. After the innumerable decisions of all the Courts and of their Lordships of the Judicial Committee that a decree against the father may, as such merely, be executed against the sons' interest in the family property also and that in such proceedings all that the sons can do is to show that the debt in respect of which the decree was passed was an illegal or immoral debt, it follows logically as referred to and explained in several judgments that the joining of the sons also as defendants originally is merely to afford to the sons an opportunity to allege and prove, if possible, that the debts are improper. It may be too late at the present day to seek to object meticulously to such form of action, but it must fall to be observed that the liability of the son to be made a party defendant in such an action has never been stated to be any legal obligation of the son himself to the creditor.

It has sometimes been stated that the liability of the son to be so made a party is on the basis of a pious obligation of the son under the Hindu Law to pay the father's debt. I shall later on have to refer to the true nature and history of this obligation. But for the present purpose the inquiry may be limited to investigating it for seeing whether that can be regarded as the true legal ground of the right of a creditor. It has never been to my knowledge suggested that the pious obligation as it may be of the son was towards any person other than the father himself. Otherwise, if it should be deemed to be towards the creditor, it is difficult to see what room there is for any piety.

The right of the creditor therefore is only against the father. If it were against the son also, the general rule should be that the son should also be made a party to the suit itself in every case and a decree obtained, and that no decree obtained merely against the father is capable, as such, of being executed against the interest of the sons also in the family property. It seems to me therefore that there can be little doubt that the pious obligation of the son is only towards the father. The right of the father corresponding to this obligation on the part

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of the son is his admitted right to alienate the entire family property including the son's share for *bona fide* antecedent debts of his own. Being a power of sale, although only under certain circumstances, it is really in the nature of property and that is how it comes about that in mere execution of the decree against the father this power of sale is enforced and made available for the satisfaction of the decree.

Again it is in the view that this power to sell possessed by the father is in the nature of property, that the legislature under certain systems of insolvency vests such power in the Official Assignee for the benefit of the creditors. The remedies of a father's simple creditor during the father's lifetime may all of them be defined and explained with reference to this power of the father. And I may also further add that they cannot be satisfactorily formulated on any other basis. It has been recognized by the Courts and approved by the Privy Council that during the father's lifetime his creditor may get a decree against the father and execute such decree against the son's share also, if the son should be unable to prove the debts to have been tainted with illegality and immorality or else may, after making the son also party to such a suit and obtaining an adjudication from the Court that the debt is a proper debt of the father, get a decree executable against the entire family property. During the father's lifetime he has undoubtedly the power to sell the whole of the ancestral estate in satisfaction of an antecedent debt and it is only in cases he does not do so and discharge the debt, that the creditor is given the right to proceed in one of the two courses above indicated.

I am therefore unable to agree that apart from the father's right of sale there is during the father's lifetime such a thing as the pious obligation of the son to pay the father's debts, and that such obligation is capable of being regarded as one in favour of a creditor and enforced as such.

The true principle of Hindu Law is that a father while living should pay up all his debts but if he should die indebted and his debts should not be discharged, he is a sinner and he has to suffer penalties in a state of existence after death. The son himself, the *Putra* etymologically is he, who saves from hell, and according to all true and correct notions of Hindu Law the pious obligation arises only after the death of the father and not before.

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When Lord Shaw delivering the judgment of the Board in the case of *Sahu Ram Chandra* v. *Bhup Singh* (9) makes the following statement, that learned Lord was merely re-stating accurately and succinctly the ancient Hindu Law on the point :

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged."

The review of this judgment by their Lordships in the case of *Brij Narain* v. *Mangal Prasad* (4) seems unfortunately to have led to the view that the whole of the passage above cited should be deemed to have been overruled. There is no doubt that in the latter case their Lordships gave effect to what they clearly considered to be the result of a series of decisions extending over a long time in all the courts in this country and recognized and allowed as an exception to the general rule that even during the father's lifetime the son can be proceeded against for the debt of the father to the extent of the joint family property in his hands. But merely because a creditor was so allowed to proceed against the son either in a suit or in execution, it does not necessarily follow that the true basis, or at any rate the true legal basis of even such exception as it may be regarded to be, is the pious obligation of the son. If the Hindu Law had merely contented itself with postulating the pious obligation of the son and not proceeded to create or recognize other rights as the consequence thereof, I for my part should have had great difficulty in accepting as logical and except on the principle of mere *stare decisis* the exceptions in the nature of the right of the father's creditor to proceed against the son even during the father's lifetime. But the Hindu Law itself, because of this pious obligation, recognized in the father the right to alienate the entire ancestral estate for his antecedent debts not being illegal or immoral, and cast the disability on the son of not questioning such alienations by the father except on the ground of the debts for the satisfaction of which such alienations were made, having been either illegal or immoral. The right therefore of the father to make

4. (1923) L R 51 I A 129 . I L R 46 A 95 : 46 M L J 23 (P C).
9. (1917) L R 44 I A 126 . I L R 39 A 437 . 33 M L J 14 (P C).

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such alienations is a right which he enjoys during his own lifetime, though no doubt the right grew out of and is based on the pious obligation of the son after his father's death to pay off his father's debts. But once such a right is recognized, there is no reason why the right of the father's creditor to proceed against the son during the father's lifetime should be referred to or based on the ultimate pious obligation of the son and not on the right of the father to alienate during his own lifetime.

To my mind, *Sahu Ram Chandra* v. *Bhup Singh* (9) has not been overruled in its entirety by the case of *Brij Narain* v. *Mangal Prasad* (4) and it must be regarded as having been merely modified to the extent of engrafting the exceptions recognized by their Lordships of the Judicial Committee on the ground of *stare decisis*. The matter, it seems to me, has been put very clearly and cogently by the following sentence in the judgment of Lord Shaw in *Sahu Ram Chandra* v. *Bhup Singh* (9) :

"If accordingly he has incurred a debt, and the debt was not for immoral purposes, the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged."

The true view therefore would seem to be that the pious obligation of the son no doubt arises only after the father's death but because of that obligation a power of sale has been created in the father and because of this power of sale it is possible to proceed even during the father's lifetime against the son's share. If we should bear in mind these principles, the answer to the question propounded would seem to be clear and conclusive. As the creditor's rights and remedies have reference to and are based on the father's power of alienation, it would follow that the creditor would have such right only if and so long as the father has such right. This extraordinary power of the father is one possessed by him only as the manager of the family. That is to say, the managers of joint Hindu families, under the law of Mitakshara, have certain powers, but in the case of father-managers their powers are larger and include the power of alienation above referred to.

On a partition of the family property there is a disruption of the family and the managership of the father ceases and with the managership being lost, the power is also lost of the father to effect an alienation of the family property

4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).
9. (1917) L R 44 I A 126 : I L R 39 A 437 : 33 M L J 14 (P C).

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not only for purposes of family necessity but also for his own antecedent debts. In the present case a *bona fide* partition effected by and between the father and the son being the basis of the question, it follows that on such partition being effected the father lost or ceased to possess his power to sell the son's share. If therefore after partition between the father and the sons, the father lost that power of sale, it must follow that the creditor cannot seek to enforce any rights based on or referable to the existence of such power.

The answer therefore to the question propounded must be in the negative and it must be held that a simple creditor of the father in a Hindu joint family is not entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons.

This conclusion which I have arrived at on what I regard as the general principles applicable to the case is the very conclusion, it seems to me, their Lordships of the Judicial Committee have stated in the case of *Brij Narain* v. *Mangal Prasad* (4). Summing up the propositions which their Lordships indicate they would wish to lay down as the result of the authorities, their Lordships state the following five propositions;

"(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, *lay the estate open to be taken in execution* proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

Proposition No. 2 begins with the expression "If he is the father and the reversionaries are the sons." Reversionaries are obviously reversionaries to the managership of the family. The pronoun 'he' refers to the subject in the previous clause, the managing co-parcener of a joint undivided estate. In other

4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).

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words, the nature, the scope and the limits of the exception engrafted by their Lordships of the Judicial Committee on the law as stated in *Sahu Ram Chandra* v. *Bhup Singh* (9) is defined to be as follows :

> If the managing co-parcener of a joint undivided estate is the father and the other members of the family are his sons the father may by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

It is clear that their Lordships did not refer to the case of the son himself being sued by the creditor as a party in the suit in which the decree is obtained because as already explained such making of the son a party is only for the purpose of concluding him with regard to raising the question of illegality or immorality of the debt. It is further significant that their Lordships, being obviously anxious to lay down the proposition in proper juristic form, should have taken care to refer to the proceeding in execution not as the right of the creditor but as the act by which the father lays the estate open. In other words, it is in full accordance with the principle I have tried to indicate that in all such suits and proceedings the creditor of the father is seeking to exercise no right of his own against the son but is only seeking to work out a right of his own debtor, the father. The language used by their Lordships leaves no doubt whatever that during the lifetime of the father the only manner in which the son's share can be attained is as indicated by them. That, according to the language used by them, can only be when the father still is or continues to be the managing coparcener of the joint undivided estate. Their Lordships were there engaged in postulating and formulating all the exceptions to the general rule and principle of coparcenary. Therefore it follows that so long as the father is alive the creditor can proceed against the son's share only if the father is and fills the character of a father-manager at the time when the decree is sought to be executed against him.

I am therefore clearly of the opinion that as their Lordships have not included or recognized any other exception to the general rule and having regard also to the language so carefully employed by them, to answer the question propounded to us in any other manner would not be in consonance with their Lordships' decision. Having therefore arrived at what I consider to be the true principles of the case and shown that such conclusion

9. (1917) L R 44 I A 126 : I L R 39 A 437 : 33 M L J 14 (P C).

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is in entire consonance with the highest and the latest authority of the Full Board of their Lordships of the Judicial Committee, I shall now proceed briefly to discuss the cases bearing on the point in this Court indicating my own view with regard to the same.

For the purposes of the present question it is unnecessary to examine all the earlier cases in which the question did not actually arise and in which therefore language has been used which we cannot regard as having been used with any special reference to the question.

I shall therefore begin only with the case of *Krishnasami Konan* v. *Ramaswami Aiyar* (5). The decision in that case was by Subramania Aiyar and Davies, JJ. No doubt the form in which the question arose was of the liability of the son's share obtained on a partition with the father, for being proceeded against in execution of a decree obtained by the father's creditor against the father subsequent to the partition and without making the son a party to the suit even though the debt itself was a debt incurred by the father before partition. The learned Judges state thus in their judgment :

"The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father, is that the father, under the Hindu Law, *is entitled to sell* on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized it remains the undivided estate of the father and the son. If the estate were divided, the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition."

In the judgment of Ramesam, J., in the case of *Jagannatha Rao* v. *Viswesam* (1), which is the judgment that has given rise to the present reference, the learned Judge after referring to the fact that that was the first case which considered the effect of a partition states thus :

"The whole decision and the exception in the case of a *mala fide* partition relate to the seizure in execution of a decree to which the son was not a party."

Apparently the learned Judge seems to have thought this a sufficient criticism and explanation of the case. It seems to me that neither the criticism nor the explanation can be regarded as correct or well founded. No doubt the District Judge from whose decision the case came up on appeal to the High Court

1. (1924) I L R 47 M 621 : 46 M L J 590.
5. (1899) I L R 22 M 519 : 9 M L J 197.

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seems in one place to have observed that though the son may be liable to pay the debt, his liability must be enforced in a suit against himself. But one has only to look at the other sentence in the judgment of the learned Judge extracted in the report of the case to see that that was not the only ground that he himself was thinking of. In any case the learned Judges in the High Court based their judgment not on any such distinction but upon the principle that the son's disability to object to ancestral property being seized in execution for an unsecured personal debt of the father, is the circumstance that the father is entitled to sell the whole of the undivided estate and that therefore after partition the creditor had no such right. This judgment is therefore clear authority for the position that the right of the creditor during the father's lifetime is based on and has reference to the right of the father to sell. It is also an authority for the further position that after partition the father loses such right of sale. The learned Judges did not base their decision on the mere circumstance that the son was not made a party to the suit in which the decree is passed. They state that the matter might conceivably have been otherwise if the partition had been made with a view to delay or defraud the creditor. It is impossible to suppose that the learned Judges thought that if the partition had been made with a view to delay or defraud the creditors the decree-holder against the father could proceed to execute the decree against the son's interest also even though the son was not a party to the decree. The learned Judges were speaking only of the liability of the son's share being proceeded against in execution of a decree, because in proper legal view even when the son is made a party to the suit during the father's lifetime and a decree is obtained, it is done not by way of enforcing any right against the son but merely to have settled in the suit itself the questions as to illegality and immorality which may be raised after decree. I am therefore clearly of the opinion that this decision of the learned Judges twenty-eight years ago in Madras was clear authority in favour of the contention that the father's debts are not binding on the son's share after partition and that there is no substance whatever in the manner in which it has been attempted to explain away this case.

The next case in Madras in order of date is the case of *Ramachandra Padayachi* v. *Kondayya Chetti* (6). The judg-

6. (1901) I L R 24 M 555.

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ment in this case has been regarded in some quarters and by Ramesam, J., in the case above cited as an authority for the proposition that the son after partition is liable for the pre-partition debt of the father. The learned Judges in this case clearly held that the debt, the subject-matter of the suit, was one which arose out of a contract entered into by a father as the managing member of an undivided family. In that view the debt was of course the debt of the family itself including the son, and in respect of such a family debt the partition could not possibly affect the liability of a son to pay the family debts from and out of the property of the family. The mere fact that the case of *Krishnasami Konan* v. *Ramaswami Aiyar* (5) was sought to be distinguished on one ground cannot be regarded as excluding the other grounds of distinction. As the judgment in that case could be regarded only as an authority for what it actually decided, it must follow that as an authority it is available only in respect of the family debts which of course are entirely different to the mere personal debts of the father.

Then we come to the case of *Kameswaramma* v. *Venkatasubba Rao* (7). Ramesam, J., has referred to this case as containing a reasoning conclusive against the contention that the son is not liable after partition. This case was one in which the question that arose no doubt was, whether a decree for a personal debt obtained against the father before partition can be executed against the property in the son's share allotted to him on partition. The point however to be remembered as regards that case is that the son who wished to have his share exempted from liability was the plaintiff who had succeeded in both the lower Courts and the second appeal by the other party was dismissed by the learned Judges. The abstract in the head-note therefore in the case to the effect that a Hindu son is liable for the debts of a father to the extent of the joint family property which came to his hands on partition, was not necessary for the decision of the case and was apparently based on the decision in the case of *Ramachandra Padayachi* v. *Kondayya Chetti* (6) without any close examination of the facts of that case. It is however significant that Wallis, J., (as he then was) states in his judgment at page 1124 that the cases referred on the other

5. (1899) I L R 22 M 519 : 9 M L J 197.
6. (1901) I L R 24 M 555.
7. (1914) I L R 38 M 1120 : 27 M L J 112.

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side were all cases in which the property *remained joint and so subject to alienation by the father* in satisfaction of his debt. This observation by the learned Judge would seem clearly to indicate that in his view the right of the creditor was really based on the father's right of alienation.

In the case of *Rathna Naidu* v. *Aiyanachariar* (10), Munro and Abdur Rahim, JJ., held that after partition a Hindu father had no right of alienating property that fell to the share of the son on the partition, even though the debts of the father for which the father purported to alienate such property were personal debts of the father not shown to be either illegal or immoral and even though antecedent to the partition. The principle of the decision of this case is apparently approved of in its entirety even by Ramesam, J., in his judgment in the case of *Jagannatha Rao* v. *Viswesam* (1). The learned Judge seems to think it obvious that the father has no such power but only that the case does not help the point under discussion.

I have already attempted to show that the right of a father's creditor to proceed even during the father's lifetime to recover the father's debt even from the son's share of the joint family property is really rested on the power of the father to alienate and not on the mere pious obligation of the son to pay the father's debt. But even if that position should not be accepted, if it should be conceded that after a partition though the pious obligation of the son to pay the personal debts of the father continues, still the right of the father to alienate the son's share ceases, the position would be this. Though the father's power of alienation and the creditor's right to proceed against the son's share are both based on the pious obligation of the son, still on a partition, what is put an end to is only the right of the father to alienate and not the right of the creditor. I find it absolutely difficult to understand the law or the logic of such a position. As already observed, I refuse to agree to the notion that there is any direct obligation on the part of the son towards the creditor, and if the pious obligation subsists, it must subsist for all purposes and the admitted fact that on partition the power of the father to alienate ceases can only be regarded as conclusive also of the other position, namely, that the power of the creditor also ceases.

1. (1924) I L R 47 M 621 : 46 M L J 590.
10. (1890) 18 M L J 599.

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The decision of this Court in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2), by Wallis, C. J., and Kumaraswami Sastriar, J., is a direct authority for the contention now advanced by the appellant in this case. Both the Chief Justice and Kumaraswami Sastriar, J., have in a long and considered judgment dealt with and discussed the whole question after an examination of all the case-law on the point. I am glad to be able to find myself in entire agreement with the views of both those learned Judges. A desperate attempt has been made to distinguish that case on one solitary ground and that was that the promissory note on which the suit was based was not the original pre-partition debt of the father but a renewal of it. I am unable to agree that that can make a real distinction in the matter. There was the pre-partition debt of the father and the renewal merely keeps it alive and does not extinguish it. What has to be looked at is the substance of the transaction and not its mere form. The learned Chief Justice really bases his judgment on the ground that the suit was filed by the creditor after partition, though he adds the words "to say nothing of the further ground that the father had no authority from the son to renew the note after partition." As I understand that sentence it can only mean that though the learned Chief Justice did attach some importance to the fact that when the father renewed the promissory note he had ceased to have any right to renew it on behalf of the son also, still his conclusion in the case was based on the fact that the suit by the creditor was instituted after partition. The whole of the reasoinng in that case is in agreement only with that view. At page 140, the learned Chief Justice says :

> "As regards our own Court, the case is, if anything stronger, because it has expressly based the creditor's right to bring to sale the son's shares for an antecedent debt *on the father's right to sell* the sons' shares for such a debt."

He proceeds further to point out by an examination of the entire case-law on the point that that has been the current and correct view. Mr. Justice Kumaraswami Sastriar bases his decision in the case on the narrow ground that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint. The question in the case with reference to which the expression "proceeded against" was used, was, not whether the son can be proceeded

2. (1917) I L R 41 M 136 : 33 M L J 519.

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against in execution of a decree, but only proceeded against in a suit by the creditor. It is impossible therefore to seek to distinguish the case on any such ground as that the expression "proceed against him" may mean proceed against in execution. Kumaraswami Sastriar, J., also bases the creditor's right to proceed against the son's share on the father's right to alienate. This is what he says at page 142 :

"So far as the creditor of the father is concerned, all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interests owing to a *bona fide* partition between them, the creditor can be in no better position"

The decision therefore of the Chief Justice and Kumaraswami Sastriar, J., in the case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) is a direct and well-considered decision on the question before us. It is therefore surprising that the learned Judges in the case of *Jagannatha Rao* v. *Viswesam* (1) should have proceeded as though the case was distinguishable and even refused to refer the question to a Full Bench. With all respect I consider that a case cannot be regarded as distinguishable merely because one could have seen his way to arrive at the same conclusion on some ground or reasoning other than that on which the judgment has been arrived at : but only if and when the ground of reasoning is such that the principle thereof fails to be available or applicable on account of some matter or step in the reasoning itself.

The decision in that case was in 1917 and since then at any rate till the later decision of this Court by Ramesam and Jackson, JJ., in the case of *Jagannatha Rao* v. *Viswesam* (1) which was in the year 1924, it has been considered as good law and followed in this Presidency. It is enough to refer merely to the judgment of Abdur Rahim and Oldfield, JJ., in the case of *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3). Ramesam, J. disposes of this case with the observation that the decision cannot be accepted as binding because it rests solely on the ground that the matter was concluded by the case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2). No doubt both the learned Judges treated the decision in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) as finally determining the question and as binding on them. But it is worthy of note that Mr. Justice Abdur Rahim makes

1. (1924) I L R 47 M 621 : 46 M L J 590.
2. (1917) I L R 41 M 136 : 33 M L J 519.
3. (1920) 40 M L J 471.

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the following observations with regard to the son's liability during the father's lifetime :

"This is not really based on the pious obligation of the son to discharge the father's debt but that it is the right of the father himself to deal with the property for such debts."

Again the reference by Ramesam, J., to the unreported decision in Appeal No. 914 of 1918 by Abdur Rahim and Phillips, JJ., would also only go further to show that the principle of the decision in *Peda Venkanna* v. *Sreenivasa Deckshatulu* (2) was accepted and followed as good law by several Judges of this Court.

On a careful examination therefore of the entire case-law in this Court I find that at least ten Judges from the year 1899 have accepted the principle and taken the view which I have taken of the question referred to us, namely, Subramania Aiyar, J., Davies, J., Sir Arnold White, Chief Justice, Bhashyam Aiyangar, J., Munro, J., Abdur Rahim, J., Wallis, Chief Justice, Oldfield, J., Phillips, J., and Kumaraswami Sastriar, J.

My lord the Chief Justice in the course of the discussion of the question before us seemed at one stage to consider that the view contrary to the one I am taking might be regarded as *stare decisis*. I am afraid that having regard to the volume of opinion and length of time, over a quarter of a century, during which the view that I have taken has been approved of and followed by the learned Judges of this Court, it is impossible to regard as settled law such opinion to the contrary as might have been held by some Judges.

As regards the case of *Jagannatha Rao* v. *Visvesam* (1) which, to my mind, is really the only decision on the other side, I must take leave to observe that Ramesam, J., who delivered the leading judgment, has proceeded not on any examination of legal principles but merely on what he regarded some of the previous decisions to have decided. I have already referred to those very decisions and tried to point out how the learned Judge has dealt with them. Jackson, J., the other learned Judge, has in his judgment referred only to some observations and certain text-books and given his own criticism or explanation of the same. I am unable to agree with the decision in that case and I feel strongly persuaded that it was against the current of decisions of this Court for over a quarter of a century.

1. (1924) I L R 47 M 621 : 46 M L J 590.
2. (1917) I L R 41 M 136 · 33 M L J 519.

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I have so far dealt with the case firstly on general principles and then with reference to the decisions of this Court. It seems to me however that with all respect to my learned brothers the question is really concluded by the highest authority because I consider that in *Brij Narain* v. *Mangal Prasad* (4) their Lordships of the Judicial Committee have taken particular care to lay down almost in statutory form the exceptions engrafted by judicial decision on the general rule of Hindu Law as set out in *Sahu Ram Chandra* v. *Bhup Singh* (9). As I read these exceptions, the statement is clear that it is only when the managing coparcener of a joint undivided estate is the father and the reversionaries are the sons, he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of his debt. The act of laying open the estate is properly and accurately referred to as the act only of the father, or, in other words, their Lordships of the Judicial Committee regard it in the nature of the father's right. According to that statement the father who can so lay it open should be the managing coparcener of a joint undivided estate, thereby clearly indicating the principle that the right so to lay it open is possessed by the father only so long as he continues to be the head of the undivided family.

It seems to me that I have striven really to arrive at the same result by showing that even the Courts in this country have allowed the creditor of the father to proceed against the son's share not really on the ground of any direct extension of the pious obligation of the son under the Hindu Law but only on the right of the father to alienate for proper debts, his sons' shares also.

In the view therefore I have taken we are bound by the decision of their Lordships of the Judicial Committee in *Brij Narain* v. *Mangal Prasad* (4) to answer the question referred to us only in the manner indicated by me, namely, in the negative.

Before I conclude it seems to me necessary that I should briefly refer to what I cannot but consider as the *reductio ad absurdum* of holding that even after partition the father's creditors can make the son's share liable by suit. I must take it that the principle on which the son's share is to be held to be

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4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).
9. (1917) L R 44 I A 126 : I L R 39 A 437 : 33 M L J 14 (P C).

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so liable is somewhat as follows :—The son is under a pious obligation to pay the father's debt. It has been held by several Courts that even during the father's lifetime his share can be proceeded against by the father's creditor. If so, the father and son cannot by any act of their own free the son's share from liability to the creditor of the father. This, to my mind, would seem to be based on some fallacious idea that the debt of the father is in some incomprehensible way a sort of a charge on the son's share. No doubt when the question is put directly it is not claimed that there is any such charge. But if there is really no charge what principle is there for lugging in the charge again by the back-door? It seems to me therefore that the moment it is conceded that there is no charge in law as such, it must be held on first principles that a partition puts an end to that state of things which enables the creditor to proceed against the son's share also. I do not see why the case of a Hindu father debtor should be treated as really worse than or different from a case of any other ordinary debtor. A debtor in respect of a simple money debt may have considerable property and, if there be no question of any alienation in fraud of the creditors, may come to dispose of the entire property without making any provision whatever for that creditor. Can it then be said that the debt was a charge on the estate which has been alienated?

Again it may be argued that the undivided sons being liable in respect of their shares for the debts of the father should on partition make suitable provision for the discharge of all such debts. That again is a question which is really one of the partition having been *bona fide* or not and with that question we have nothing to do because for the purposes of the question we have been asked to assume that the partition between the parties in this case was in good faith and was otherwise also proper.

Let us take the case of the sons on partition having allotted to the father sufficient property to pay off his personal debts and if such a father should waste or dispose of all that he obtained on partition without paying off his creditors, what equitable rule or principle can be referred to or relied upon for the purpose of enabling the creditor of the father who has slept over his rights afterwards to wake up and proceed to claim payment of his debt from the properties allotted to the son? If the creditor can be attempted to be defrauded by a *mala fide* partition, it is equal-

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ly open to the father to collude with his creditors and vex and annoy the son with whom he may become disaffected.

I have made these observations not because they have any bearing on the question of law before us but only to show that in answering the question we should not allow ourselves to be influenced by any considerations of creditors being defeated.

If therefore the father's debt is not a charge on the son's share and if the liability of the son's share should be founded simply on his so-called pious obligation, it seems to me as a matter of legal principle impossible to limit the liability of the son's share only to pre-partition debts. I take it that it is conceded on all hands whether as a matter of logic or of law that the son's share is not liable for the post-partition debts of the father. It is permissible in such a case to ask, what is the legal principle on which the liability is sought to be excluded? Excepting perhaps the answer that it may be just and convenient to do so I do not see how, if pious obligation should alone be the legal ground, the liability of the son's share for all the debts which the father may go on borrowing even after partition can be excluded. The injustice and inequity of so holding may be felt to be quite obvious; but there is no escaping from it if the ground of liability should be regarded or decided to be the pious obligation of the son.

The result therefore would undoubtedly be that no son under the Hindu Law could possibly in any manner or by any means effectively protect himself and his share in the family property against a borrowing or designing father. Whatever the law was in the pre-Mitakshara days the law of Mitakshara finally and conclusively established the right of a son as a coparcener in the family property, subject no doubt and subject only to certain well-defined exceptions. The right of the son as such coparcener would be reduced to merest nullity and rendered absolutely illusory if the question before us should be answered against the son.

The claim to partition and separation has always been held and regarded as the only instrument available to a coparcener for the purpose of preventing maladministration of the family estate or waste by the managing member, and if in the case of most joint families constituted by the father and son the son's right to partition should come to be held to be absolutely ineffectual for the main purpose in view, it would only come to a virtual denial of the right of partition to the Hindu son. I venture to think that that is not the law of

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Mitakshara. I have therefore been constrained to come to the conclusion that the answer to the question which is in most consonance with principle, with the decisions of this Court, and with the highest authority in the matter and also with justice and equity, is as I have already indicated, *viz.*, in the negative, that the father's creditor has no right to proceed after a *bona fide* partition to seek to recover from the son's share though in so answering the question I have had to differ from some of my learned brothers. My only consolation is that I have arrived at the conclusion after giving the matter my most anxious and serious consideration.

Ananta krishna Aiyar, J.

Anantakrishna Aiyar, J :—The question referred to the Full Bench for decision is

"whether a simple money creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons."

In discussing this question I may start by stating that under the old Hindu Law texts, a Hindu son is liable to pay the debts of his father which are not illegal or immoral, though he did not inherit any ancestral property. See *Ponnappa Pillai* v. *Pappuvayyangar* (8). At p. 21 it is mentioned "Neither coparcenary relation nor the taking of assets is a pre-requisite". The author of the Mitakshara observes :

"If no assets of the father or grandfather have been left, then the debts must be paid by the son or the grandson."

But English writers on Hindu Law construed the Hindu Law texts as imposing only a moral obligation on the sons to discharge their father's debts, in case the son inherited no ancestral property.

"In their Proceedings of the 27th February, 1837, and in their Circular Order, dated 8th December, 1840, the Judges of the late Sadr Court observed that when no assets were inherited the question of the son's liability for the father's debts was one of contract and governed under S. 16 of the Madras Regulation III of 1802, not by Hindu Law, but by the rule of equity and good conscience."

The Sadr Court held that,

"inheritance is the cause of son's civil obligation; that its value is the extent of that obligation and that any duty recognized by the Hindu Law in excess of it is not enforceable by a Court of Justice."

Similarly in *Masit Ullah* v. *Damodar Prasad* (11), the Privy Council observed as follows :

"The Hindu lawyers appear to have made difference in the obligations resting upon sons, grandsons and great-grandsons. The son was

8. (1881) I L R 4 M 1 at 18 (F B).
11. (1926) L R 53 I A 204 : I L R 48 A 518 at 526 : 51 M L J 792 (P C).

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bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandson had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor. The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive."

In *Girdharee Lall* v. *Kantoo Lall* (12) the Privy Council observed :

"It would be a pious duty on the part of the son to pay his father's debts and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son as the son of his father acquired an interest by birth is liable to the father's debts."

It must therefore be taken as settled law that to the extent of property received by the son, the son is bound to pay the debts of his father which are not shown to have been incurred for illegal or immoral purposes.

The next question whether the pious obligation of a son exists during the father's lifetime or comes into existence only after the death of the father has now been definitely decided by the Privy Council. Having regard to the observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (9) and *Chet Ram* v. *Ram Singh* (13), the question was re-argued before a Full Board of the Privy Council in *Brij Narain* v. *Mangal Prasad* (4). The Privy Council held that the pious obligation of the son existed during the lifetime of the father and agreed with the Full Bench decision of the Madras High Court in *Arumugam Chetty* v. *Muthu Koundan* (14). The law is now settled that under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead.

It seems to be thus settled that if a creditor lends money to a Hindu father, having sons undivided with him, the debt is enforceable by the creditor not only personally against the father, but by proceeding against the whole of the joint family properties of the father and the sons. The Full Bench decision in *Ramaswami Nadan* v. *Ulaganatha Goundan* (15) held that the cause of action against the sons arose at the same time as it arose against the father and that the creditor could prosecute

4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).
9. (1917) L R 44 I A 126 : I L R 39 A 437 : 33 M L J 14 (P C).
12. (1874) L R 1 I A 321 at 331.
13. (1922) L R 49 I A 228 : I L R 44 A 368 : 43 M L J 98 (P C).
14. (1919) I L R 42 M 711 : 37 M L J 166 (F B).
15. (1898) I L R 22 M 49 : 8 M L J 312 (F B).

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his claim against the sons also in the suit he files against the father and could obtain a decree making the sons' shares also in the family property liable for the father's debts.

If a creditor does not make the sons parties to the suit against the father but obtains a decree against the father only, and if the father should die after the decree, then the sons' shares are not liable to be taken in execution of the decree against the father to which the sons were not parties. As stated in *Krishnasami Konan* v. *Ramaswami Aiyar* (5) :

"He could not proceed in execution against the son's property which fell to him at the partition. That is, the son's own share though liable for the father's debts is not liable to be taken on a decree to which the son is not a party." "If the estate were divided, the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father even though the debt had been incurred before the partition."

The learned Judges, Subramania Aiyar and Davies, JJ., used the words "cannot be seized". What exactly was meant by that expression was explained in *Ramachandra Padayachi* v. *Kondayya Chetti* (6) by Sir Arnold White, C. J., and Bhashyam Aiyangar, J. At page 557, the learned Judges say as follows :

"The decision in the case in *Krishnasami Konan* v. *Ramaswami Aiyar* (5) is clearly distinguishable from the present case. In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father only in such suit. The case turned on the plaintiff's right in execution, not as here on the question whether the plaintiff is entitled to judgment as against the son."

After thus explaining the decision in *Krishnaswami Konan* v. *Ramaswami Aiyar* (5) the Court held that the son was liable to the extent of the family property which had come to him under the partition for a debt incurred by the father before partition. The father was made the 1st defendant to the creditor's suit and the divided son was made the 2nd defendant to the suit. The Court held as follows :

"In our opinion the plaintiff is entitled to judgment as against the 2nd defendant in respect of this liability, but the 2nd defendant's liability is limited to the extent of the family property which came to him under the partition."

In *Periyasami Mudaliar* v. *Seetharama Chettiar* (16) Bhashyam Aiyangar, J., discussed the same principles. In *Kameswa-*

5 (1899) I L R 22 M 519 at 520 : 9 M L J 197.
6. (1901) I L R 24 M 555.
16. (1903) I L R 27 M 243 at 247 and 248 : 14 M L J 84.

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ramma v. *Venkatasubba Rao* (7) Wallis, J., understood the decision in *Ramachandra Padayachi* v. *Kondayya Chetti* (6) as laying down the following proposition :

> "I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition"

In this state of authorities the question came before Wallis, C. J., and Kumaraswami Sastriar, J., in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2). There, after partition, a Hindu father executed a renewed promissory note in favour of the creditor, who sued the father and the sons on the footing of the renewed promissory note. The Court held that

> "A Hindu son is not liable during his father's lifetime on a promissory note executed by the father after partition in renewal of a note executed by the father before partition."

The actual decision of the Court was thus confined to the case of a suit instituted on the basis of a *renewed* promissory note executed by the father partition. In the coures of the judgment there are no doubt observations by Kumaraswami Sastriar, J., to the effect that

> "a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint."

The judgment also proceeds to state that

> "it is clear that whatever may be the pious duty of the son after the father's death, the duty in the father's lifetime is only to pay if the father is unable to do so."

This was long before the decision of the Privy Council in *Brij Narain* v. *Mangal Prasad* (4) in which, as already observed, the Full Board of the Privy Council explained the previous decisions of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (9) and *Chet Ram* v. *Ram Singh* (13) and definitely decided that the pious obligation of a son to pay his father's debts exists whether the father be alive or dead.

It will be seen from the above discussion that the trend of judicial decisions has been to this effect, namely, that a Hindu

2. (1917) I L R 41 M 136 : 33 M L J 519.
4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).
6. (1901) I L R 24 M 555.
7. (1914) I L R 38 M 1120 : 27 M L J 112.
9. (1917) L R 44 I A 126 : I L R 39 A 437 : 33 M L J 14 (P C).
13. (1922) L R 49 I A 228 : I L R 44 A 368 : 43 M L J 98 (P C).

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son is bound to pay the debts of his father not incurred for illegal or immoral purposes to the extent of the ancestral properties received by him; that the creditor should make the son also a party with the father to the suit and thus obtain a decree binding on the son, to the extent of the property in their hands, in execution of the decree; that if the sons be not made parties to the suit and decrees be obtained against the father only, then in case the father should happen to die before the decree is satisfied, the family property in the hands of the son could not be seized in execution of the decree against the father; and that even after partition the family property that fell to the share of the son would be liable to a pre-partition creditor of the father, but that the creditor should make the father and the son both parties to the suit; and that the creditor could not by obtaining a decree against the father in a suit in which the sons were not parties proceed to execute the decree against the properties allotted to the sons under the partition. And finally if the cause of action for the suit be not the original debt incurred before the partition but a promissory note executed by the father alone after partition though in renewal of a promissory note executed by him before partition, the sons are not liable to any extent if the suit be based on the renewed promissory note only.

In this state of authorities the question whether the property in the hands of a divided son could be made liable, by making him also a party to the suit instituted by the creditor after partition though in respect of a debt incurred by the father prior to partition, came on for decision before Abdur Rahim and Oldfield, JJ., who held in *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3) that the property in the hands of the son was not liable; but the learned Judges did not discuss the question but simply stated as follows:

> "All the Madras and some other decisions as well were considered in the recent case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) decided by the learned Chief Justice and Mr. Justice Kumaraswami Sastriar."

It would be seen that the actual decision in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (2) turned on the fact that there the suit was based on a renewed promissory note given by the father alone after partition. When therefore the same question raised in *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3) arose again for decision in *Jagannatha Rao* v.

2. (1917) I L R 41 M 136: 33 M L J 519. 3. (1920) 40 M L J 473.

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Viswesam (1), Ramesam and Jackson, JJ., held that the decision in *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3) was not justified by the prior authorities; and deeming it unnecessary to refer the question to a Full Bench, the learned Judges held that the pre-partition creditor could after the partition sue the son also and recover the debt from the joint family properties allotted to the son at the partition.

In *Brij Narain* v. *Mangal Prasad* (4) the Privy Council make the following observations. After observing that while on the one hand sons acquire right in the joint family property by birth and on the other hand the father could bind the sons' shares also in the joint family property, their Lordships state at page 101 :

> "It is more than apparent how in practice these two principles may clash . . . . It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop;"

and finally say as follows at page 102 :

> "In such a matter as the present, it is above all things necessary *stare decisis* not to unsettle what has been settled by a long course of decisions."

The course of decisions in this Presidency as stated already is in favour of the view taken in *Jagannatha Rao* v. *Viswesam* (1). There is also the following statement in S. 271 of "A Manual of Hindu Law as prevailing in the Presidency of Madras" by T. L. Strange (formerly a Judge of this Court) :

> "*S.* 271.—In making partition, debts and other charges on the property are to be provided for (I. 191, 192). This may be done by division of the liabilities among the co-heirs (ii 283 : C), or by special allotment of property to meet the demand as when provision of maintenance is in question. The creditors however would not be debarred by such partition or arrangement from pursuing the whole property."

The reference to (I. 191, 192) is to the learned author's father's Hindu Law, *i.e.*, Sir Thomas Strange's Hindu Law, Volume I, pages 191 and 192. See also *Venkureddi* v. *Venku Reddi* (15).

Thus on the ground of *stare decisis* above, the decision in *Jagannatha Rao* v. *Viswesam* (1) (which followed the previous decisions of this Court) should, I think, be followed, in preference to the decision in *Karri Venkatareddi* v. *Chelluri Satyanarayanamoorthi* (3).

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1. (1924) I L R 47 M 621 : 46 M L J 590.
3. (1920) 40 M L J 473.
4. (1923) L R 51 I A 129 : I L R 46 A 95 : 46 M L J 23 (P C).
15. (1926) I L R 50 M 535 : 52 M L J 387 (F B).

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On principle also I think we should come to the same conclusion. If the creditor had the right to proceed against the whole of the joint family property for satisfying his debt, which was incurred by the father when he was undivided with his sons, it is difficult to see on what principle the creditor would lose that right simply because subsequently the father and the sons effected partition among themselves. If the property passed out of the family and into the hands of *bona fide* purchasers for value, then the creditor who holds no charge on any specific property of the family would not in equity be allowed to proceed against the property in the hands of such *bona fide* purchasers. But that principle would not apply when the property remains in the possession of the members of the family—namely, the sons—after partition. The circumstance that the partition arrangement was arrived at *bona fide* does not really matter, so far as the family creditors are concerned. We are not now concerned with the question whether a partition arrangement under which no due provision is made for the discharge of such family debts incurred by the father could be upheld as in fact a *bona fide* one; but proceeding on the assumption (as we have to do to answer the present reference before the Full Bench) that the partition was a *bona fide* one, it seems to me that such a creditor is entitled by taking proper proceedings to make the family property allotted to the sons also liable for his debt which was incurred by the father before partition and which is not of an illegal or immoral nature.

On reference to modern text-book writers on Hindu Law I find that the following learned authors take the view that family property allotted to the son on a partition could be proceeded against by a creditor for pre-partition debt incurred by the father when the same was not incurred for illegal or immoral purposes. See Gopalchander Sarkar Sastri's Hindu Law, 5th edition, page 348; Ghose's Hindu Law, Volume I, page 520; Mulla's Hindu Law, 5th edition, page 299; Gour's Hindu Code, paragraph 118, page 595. I may quote one passage from Sarkar Sastri's book as expressing the learned author's opinion on the point under discussion.

"It would seem that partition is the only remedy by which a son may now protect his interest from the liability of paying off the debts of an extravagant father, but this would apply only to debts incurred after the partition."

We have not been referred to any definite pronouncement by their Lordships of the Privy Council on the point now under

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consideration. Mr. T. M. Krishnaswami Aiyar, the learned vakil for the appellants strongly relied upon certain passages occurring in some of the Privy Council cases as indicating their Lordships' opinion that the existence of an undivided estate was a condition precedent to entitle such a creditor to enforce the pious obligation of the sons to pay their father's debts. *Suraj Bunsi Koer* v. *Sheo Persad Singh* (17); *Nanomi Babuasin* v. *Modhun Mohun* (18) and *Brij Narain* v. *Mangal Prasad* (4). After giving my most careful consideration to the judgments in the above cases, I am not able to accept this argument. No doubt, there is reference to "joint estate" [*Nanomi Babuasin* v. *Modhun Mohun* (18)], "family and undivided estate" [*Brij Narain* v. *Mangal Prasad* (4)] in the judgments of the Privy Council. But the Privy Council had not to decide the present question at all nor is there even a reasonable indication that their Lordships were considering the question which arises for decision in the present reference. In all these cases, the father and the sons were (if I am not mistaken) undivided, and consequently the use of the expressions "joint estate,"—"family and undivided estate,"—was natural. If there be a definite dictum of the Privy Council on this point, then, no doubt, the same would be entitled to the highest respect and I would be justified (and in fact bound) in deciding in accordance with the same. But as matters stand, I do not feel that I am entitled to take the above expressions occurring in the judgments of the Privy Council as in any way indicating their Lordships' opinion on the present question, much less as concluding the matter, so as to overrule the decisions of this Court mentioned before.

On the question as to what is the proper procedure to be followed by the creditor in such cases, cases have laid down that the effect of partition is to take away from the father the right to represent the sons, whether in Court or outside. Though by reason of his position at the time of incurring the debt he had the right to make the debt binding on the sons' shares also of the family property, he loses the right to represent the sons after partition. The creditor who wants, after partition, to make the family property allotted to the sons also liable for his debt should make the sons also parties to his suit. By obtaining a decree against the father only, the creditor could not execute the decree against the properties allotted to the sons. Nor could the father,

4. (1923) L R 51 I A 129 : I L R 46 A 95 at 104 : 46 M L J 23 (P C).
17. (1879) I L R 5 C 148 at 169.
18. (1885) I L R 13 C 21 at 35 (P C).

after partition, mortgage or sell the property allotted to the sons even though it be in connection with a pre-partition debt incurred by him. With reference to any debt incurred by the father after partition, it goes without saying that neither the father nor the creditor could in any way make the properties allotted to the sons liable. I may mention by way of analogy the case of a Malabar Tarwad. A simple money debt incurred by the Karnavan for Tarwad purposes would be binding on the Tarwad properties in the sense that the creditor could get satisfaction of his decree by proceeding against those properties; but supposing the Karnavan who contracted the simple debt was removed from Karnavanship by decree of Court or otherwise, then it could not be pretended that the creditor could by obtaining a decree only against the executant of that bond—the *Quandum* Karnavan—and ignoring the present Karnavan, execute that decree against the Tarwad properties. By reason of his removal from Karnavanship, the *Quandum* Karnavan lost his right to represent the corporation called the Tarwad. Similarly a Hindu father after partition would cease to represent the *Quandum* corporation of the joint Hindu family. Creditors should in such cases make the other members also parties, in case the properties allotted to them at the partition are also sought to be proceeded against to satisfy the decree. That is a matter of procedure.

On principle, it seems to me that a simple money debt incurred by a joint family manager for purposes binding on the joint family, which a creditor of a family could enforce payment of by proper proceedings against all the family properties, does not cease to be so enforceable simply because a partition has subsequently been effected among the members of the joint family. The same rule, it seems to me, would apply to the case of a simple money debt contracted by an undivided Hindu father (not proved by the sons to have been incurred for immoral or illegal purposes) when a partition takes place between the father and the sons.

Hindu Law texts prescribe that debts of the father should be paid at the time of the partition and only what is left should be divided. No doubt ordinarily a partition of the estate was not contemplated during the father's lifetime. But whenever it took place, the texts seem to be clear that the debts of the father should be paid and only what is left be divided. See Smrithi Chandrika, Chapter II, S. II, paragraph 23 (page 228

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of Setlur's translation—Volume I). See also page 342 of Ghose's Hindu Law, Volume II—edition of 1917.

It seems to me that the answer to be given to the question now referred to the Full Bench has already been furnished by the learned Judge, Sir V. Bhashyam Aiyangar, J., in the course of the argument in *Ramachandra Padayachi* v. *Kondayya Chetti* (6). After distinguishing the decision in *Krishnasami Konan* v. *Ramaswami Aiyar* (5) on the ground that "there, the suit was brought by the creditor against the father alone after partition; and in execution property which fell to the son's share was attempted to be taken,"—the learned Judge is reported to have wound up the discussion by saying that *"if the son had been made a co-defendant, the property which had fallen to his share would have been liable."* (The italics are mine.) This shows how the law was understood in this Presidency in 1901. I respectfully agree with the opinion of the learned Judge and it seems to me that it furnishes the answer to the question referred to the Full Bench.

For the above reasons I would answer the question referred to the Full Bench in the affirmative.

N.S. *Reference answered in the affirmative.*

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5. (1899) I L R 22 M 519 : 9 M L J 19[illegible].
6. (1901) I L R 24 M 555 at 557.

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Year.	No.	Short title.	Amendments.
1898	V	The Code of Criminal Procedure, 1898.	(1) In sub-section (1), clause *sixthly*, of section 54, for the words "Army or Navy" the words "Army, Navy or Air Force" shall be substituted. (2) In the second proviso to section 188, for the words and figures "the Foreign Jurisdiction and Extradition Act, 1879," the words and figures "the Indian Extradition Act, 1903," shall be substituted. (3) In section 317— (i) in sub-section (1), after the word "Army" the words "or Air Force" shall be inserted; and (ii) in sub-section (2), for the word "military", in both places where it occurs, the word "official" shall be substituted. (4) In clause (*f*) of section 320, after the word "Army" the words "or Air Force" shall be inserted. (5) In sub-section (1) of section 549— (i) for the words "Army Act or" the words "Army Act and the Air Force Act and" shall be substituted; (ii) for the words "military law" the words "military or air-force law" shall be substituted; (iii) after the word and figures "section 41" the words and figures "or under the Air Force Act, section 41" shall be inserted; (iv) for the words "military station" the words "military or air force station, as the case may be," shall be substituted. (6) In Schedule II— (i) in the entries in column 2 against sections 131, 133, 135, 136 and 138, for the words "or sailor" the words "sailor or airman," shall be substituted; (ii) in the entry in column 2 against section 140, after the word "soldier", in both places where it occurs, the words "sailor or airman" shall be inserted.
1899	II	The Indian Stamp Act, 1899.	In Article No. 53 of Schedule I— (i) in clause (*d*), for the words "or soldiers" the words "soldiers or airmen" shall be substituted, and for the words "Her Majesty's Army or Her Majesty's Indian Army" the words "His Majesty's military or air forces" shall be substituted;

Year.	No.	Short title.	Amendments.
1899	II	The Indian Stamp Act, 1899—(*Contd.*)	(ii) in clause (*i*), for the words "or soldier" the words "soldier or airman" shall be substituted, and for the words "either of the said Armies" the words "any of the said forces" shall be substituted ; (iii) in clause (*f*), for the words "or soldiers" the words "soldiers or airmen" shall be substituted.
1901	II	The Indian Tolls (Army) Act, 1901.	(1) In the Title, after the word "Army" the words "or Air Force" shall be added. (2) In the Preamble— (i) in the first paragraph, after the word "soldiers" the word "airmen" shall be inserted, after the words "attached to the Army" the words "or to the Air-Force" shall be inserted, and after the words and figures "section 143 of the Army Act" the words and figures "or by section 143 of the Air Force Act" shall be inserted; (ii) in the third paragraph, after the word "Army", where it occurs for the second time, the words "or Air Force" shall be inserted ; (iii) in the fourth paragraph, after the words and figures "section 169 of the said Army Act" the words and figures "and by section 169 of the said Air Force Act" shall be inserted, and after the words and figures "section 143 of the said Army Act" the words and figures "and by section 143 of the said Air Force Act" shall be added. (3) In clause (*b*) of section 2, after the word "includes" the words "His Majesty's Regular Air Force as defined by section 190, clause (8), of the Air Force Act and also" shall be inserted. (4) In section 3— (i) after the word "military", wherever it occurs, the words "or air-force" shall be inserted ; (ii) in clause (*a*), for the words "and soldiers" the words "soldiers and airmen" shall be substituted, and after the words "Regular Forces" the words "and all officers and soldiers of" shall be inserted ; (iii) in clause (*f*), after the word "soldiers" the word "airmen", and after the word "soldier" the word "airman", shall be inserted. (5) In sub-section (1) of section 4, after the word "military" the words "or air-force" shall be inserted.

Year.	No.	Short title.	Amendments.
1908	V	The Code of Civil Procedure, 1908.	(1) In Order V in the First Schedule— (i) in rule 27, for the words " or naval " the words " naval or air" shall be substituted; (ii) in rule 28, after the word " soldier " the words " or airman " shall be inserted. (2) In Order XXVIII in the First Schedule— (i) in the heading, after the words "Military Men " the words " or Amirmen " shall be inserted; (ii) in rule I— (a) for the words " or soldier ", wherever they occur, the words "soldier or airman" shall be substituted; (b) after the word " military " wherever it occurs, the words " or air-force " shall be inserted; (iii) in rules 2 and 3, for the words " or a soldier " and for the words " or soldier ", wherever they occur, the words " soldier or airman " shall be substituted.
1908	IX	The Indian Limitation Act, 1908.	In the First Schedule, Article 162— After the words " by any of " the words " the following Courts, namely," shall be inserted, and for the words " and Bombay or the Chief Court of Sind, or the Chief Court of the Punjab or the Chief Court of Lower Burma " the words " Bombay, Lahore and Rangoon and the Chief Court of Sind " shall be substituted.
1912	IV	The Indian Lunacy Act, 1912.	(1) In section 12, after the words " Army Act " the words " or the Air Force Act " shall be inserted, and after the word " military " the words " or air-force " shall be inserted. (2) In sub-sections (2) and (3) of section 32 after the word " military," wherever it occurs, the words " or air-force " shall be inserted.
1913	III	The Administrator-General's Act, 1913.	(1) In the heading to sections 15, 16 and 17, after the words " Army Act " the words " or the Air Force Act," shall be added. (2) In section 17, after the words " Army Act " the words " or the Air Force Act " shall be inserted.
1924	II	The Cantonments Act, 1924.	(1) In sub-section (1) of section 51, after the word " Command, " the words " the reference being made, save in cases where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act, " shall be inserted. (2) In sub-section (1) of section 52, after the word " District " the words " or, where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act, of his own motion " shall be inserted.

Year.	No.	Short title.	Amendments.
1924	II	The Cantonments Act, 1924—(*Contd*).	(3) In sub-section (2) of section 287, for the words "when any application for the registration of a document relating to immoveable property within the cantonment is made, cause a copy thereof to be forwarded" the words "when any document relating to immoveable property within the cantonment is registered, send information of the registration" shall be substituted.
1925	XXXIX	The Indian Succession Act, 1925.	(1) In the *Explanation* to section 10, for the words 'or military" the words "military or air-force" shall be substituted. (2) In sections 63 and 65, after the word "warfare" the words "or an airman so employed or engaged," shall be inserted. (3) In clauses (*e*), (*f*), and (*g*) of section 66, after the word "soldier" the word "airman" shall be inserted. (4) In section 157, in the *Illustration*, for the figures "5,000" the figures "500" shall be substituted.
1926	XXVII	The Transfer of Property (Amendment) Act, 1926.	In section 2, in the definition of the word "attested", after the word "means" the words "and shall be deemed always to have meant" shall be inserted.
1926	XL	The Indian Succession (Amendment) Act, 1926.	In section 1, for the word and brackets "(Amendment)" the words and brackets "(Second Amendment)" shall be substituted.

THE SECOND SCHEDULE.

REPEALS.

(*See* Section 3.)

Year.	No.	Short title.	Repeals.
		Acts of the Governor-General in Council or of the Indian Legislature.	
1898	V	The Code of Criminal Procedure, 1898.	(1) In sub-section (1) of section 54, at the end of the clause *seventhly*, the word "and". (2) In sub-section (1) of section 269, the words "with the like sanction."
1908	XVI	The Indian Registration Act, 1908.	Section 9.
1915	VII	The Delhi Laws Act, 1915	In Schedule II, the entry relating to the Punjab Alienation of Land Act, 1900.
1926	IX	The Insolvency (Amendment) Act, 1926.	In clause (*c*) of section 11, the words and figures "sub-sections (1), (2) and (3) of".
		Regulation by the Governor-General in Council.	
1900	I	The Chittagong Hill Tracts Regulation, 1900.	In column 5 of the Schedule in the entry against the Code of Criminal Procedure, 1898, the word "diwans".